

**THE SELLER'S DUTIES IN SALE OF GOODS: A
COMPARATIVE APPROACH**

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1999



DECLARATION

I hereby declare that unless otherwise mentioned by quotations or references, this thesis has been entirely and solely composed by me. Moreover, no parts of that has been published or submitted for another degree.

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ACKNOWLEDGEMENT

With the name of Allah, the Compassionate, the Merciful. Praise be to Allah, the Sustainer of the Worlds, and Peace be upon the Chief of Prophets and Messengers and his pure and Chaste descendants.

It gives me a grate pleasure to thank all those -too numerous to name them specifically- who have helped and inspired me during the research and preparation of this thesis, for all their support and guidance.

ABSTRACT

The purpose of this thesis is to discuss and compare a seller's duties with respect to delivery and quality of the goods sold under specified national systems namely English, United States (US), French and Iranian law as well as the Vienna Convention for International Sale of Goods 1980 (CISG).

The thesis consists of an introduction and two parts. Part 1 consists of 5 chapters each of which is respectively devoted to the discussion of the seller's duty to deliver under one of the aforesaid legal systems. This discussion covers a variety of issues such as modes of delivery, time of delivery, place of delivery, quantity of the goods delivered, breach of the duty to deliver by the seller and his right to remedy the breach both before and after expiry of the time for delivery. The discussion goes on to deal with the issue of the buyer's remedies for breach of the contract by the seller including his right to reject the goods or to revoke his acceptance of the goods, to apply for damages on the basis of "cover" or "contract-market" differential price formula, and to demand compensation for incidental and/or consequential damages caused by the breach. The discussion will end by considering the aggrieved buyer's chance to acquire an order from the court requiring the seller to specifically perform the contract under foregoing systems.

Part 2 of this thesis contains 6 chapters. The first chapter of this part concerns the seller's duty as to quality of the goods under the English system and examines the problems arising from both the express warranties and the implied warranties imposed by the law. The same discussion will follow in chapters 2-5 which has been allocated respectively to US, French, Iranian law, and the CISG. Finally, the thesis will end with chapter 6 which is allocated to the issue of conclusion of the foregoing discussions.

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THE SELLER'S DUTIES IN SALE OF GOODS: A COMPARATIVE APPROACH

Introduction

This thesis is an examination of two central features of the law relating to the sale of goods. The duties of the seller with regard to delivery and the issue of quality of the goods are matters of profound importance in commercial practice and in the law.

There is a widely-recognised principle that the parties to a contract of sale are free to determine their obligations vis-à-vis one another. However, because of the complexity and diversity of the contracts, it is difficult for the parties to anticipate all eventualities and to stipulate all the features of their transaction with one another. Consequently, the law is required to adjudicate on disputes relating to issues which have not been clearly provided for by the parties concerned.

The approach adopted here is comparative. It is particularly useful to adopt a comparative view in sale matters because of the extent to which this area of the law in many jurisdictions has been influenced by the law of other jurisdictions.

The legal systems chosen for this study are the following: English law, US law, French law, and Iranian law as well as the Vienna Convention for International Sale of Goods 1980 (CISG). The choice of these systems is made on the following grounds: English law is a system of mercantile law which has been widely influential owing to British trading and political influence over the last several centuries. US law is chosen for its evident importance as the law of the most significant trading jurisdiction in modern times. It also represents an interesting development on English law, on which it is based. The US Uniform Commercial Code (UCC) is based mainly on the previous US Uniform Sales Act 1903, and as such embodies many principles of English law, even if it has some particular features which in many instances differ from English law. French law is chosen as an important system

which has many similarities with other continental systems, and also has had a profound influence on Iranian law and other middle eastern legal systems. Iranian law is chosen as a significant trading system in the middle east, which is based mainly on Islamic law and as such shares many principles with other Moslem legal systems in the world. The ever increasing volume of sale transactions in the international arena, and the problems and uncertainties arising from the differences between various legal systems which apply to such transactions, necessitates an examination of the CISG in the context of the foregoing legal systems. The purpose of this is to ascertain whether, and to what extent, the drafters of the CISG have succeeded in achieving uniformity in this area of law .

The thesis attempts a critique, and sets out to highlight problems encountered in this area in each legal system. Account is taken of variety of views and arguments expressed by commentators on these systems, with a view of proposing an appropriate solution. To support this discussion, other legal systems and legal institutes such as German, and Swedish law, as well as the United Nations Commission on International Trade law (UNCITRAL), the 1964 Hague Uniform Law on the International Sale of Goods (ULIS), as well as the Islamic principles, may also be referred to from time to time.

PART 1

The Seller's Duty to Deliver the Goods Sold

Chapter 1

Delivery of Goods under English Law

Delivery of the goods to the buyer is the ultimate goal of the parties in entering into a contract of sale. In fact, one of the main obligations of the seller in a binding sale under all legal systems is to deliver the goods to the possession of the purchaser in conformity with the contractual terms. This obligation to deliver is important for other reasons: for its performance by the seller determines the time when the title and the risk in the goods pass to the buyer. Nonetheless, what is to be done by the seller in the implementing of this obligation may vary under different legal systems.

Like the French system, section 27 of the Sale of Goods Act 1979 imposes a duty on the seller to deliver the goods sold to the buyer.¹ Section 61(1) of the Sale of Goods Act 1979 defines “delivery” as the “voluntary transfer of possession from one person to another.” Accordingly, it is the duty of the seller in a contract of sale to transfer possession of the goods sold to the purchaser² unless otherwise expressly or impliedly agreed by the parties concerned.³

Like civilian systems, the seller’s duty to deliver covers three entirely different possibilities. There may be a duty on the part of the seller to deliver the article sold to the buyer where the property in it has already passed to the latter. In such instances, the duty of delivering the article is specific and the seller, subject to the issue of the payment of the purchase price by the buyer, is in breach of this duty where he fails to deliver that particular article. In other words, in these instances the seller, without the consent of the buyer has no right to substitute another article in fulfilling his duty under the contract with the latter.

In the case of sale of purely generic goods the seller’s duty to deliver is a duty to procure and supply to the buyer goods in accordance with the contractual

¹ For the provisions of this section, see Appendix II.

² See *Biddell Bros. v. E Clemens Horst & Co. Ltd.* [1911] 1 K.B. 934 at p. 958, *per* Kennedy J.; *Kwei Tek Chao v. British Traders & Shippers Ltd.* [1954] 2 Q.B. 459 at p. 486, *per* Devlin J.

³ See e.g., the case of *Levy & Co. Ltd. v. Goldberg* [1922] 1 K.B. in which it was held by McCardie J. that the seller did not have to tender delivery but need only have been ready and willing to deliver.

descriptions, but he is under no obligation to deliver any particular lot of goods as no particular goods have been designated to which the duty of delivery attaches. Accordingly, the buyer cannot sue the seller for breach of the duty of delivery under the contract of sale where the latter procures goods in accordance with the contractual descriptions, intending to use them in fulfilment of the contract, but later changes his mind and sells them to another person.⁴ Moreover, the buyer, in such instances, may not apply to the court to grant a decree of specific performance as such a decree can be obtained only where the goods are specific or where they have been ascertained by the parties to the contract.

Finally, there is the possibility that the seller may have undertaken to deliver a particular lot of goods although the property in them has not yet passed to the buyer. This is the case where there is an agreement between the parties for the sale of specific goods. Obviously, the seller is in breach of the contract if he resells those particular goods to a third party. Even in a case of the sale of unascertained goods, it is possible for the parties to attach to the seller's duty of delivery a particular lot of goods before the passing of the property to the buyer, in which case the seller cannot resell the goods without being guilty of breach of contract with the latter. For example, in a F.O.B. contract, the seller who ships the goods but retains the bill of lading as security for the payment of the price by the buyer, will come under an obligation to deliver the actual goods shipped to the latter, though the property in them does not pass until full payment of the price and acquirement of the documents by the buyer.⁵ Likewise, the effect of a notice of appropriation in a C.I.F. contract to the buyer is to fix the goods to be delivered by the seller who retains the title in the goods until the bill of lading is transferred to the former. It might be noted that prior to the Bills of Lading Act 1855, the buyer as an indorsee of a bill of lading could neither sue nor be sued on the contract of carriage.⁶ Under alteration made by this Act to this highly in-convenient rule, all rights of suit under the contract of carriage were

The decision complies with the requirement of section 28 of the Sale of Goods Act 1979.

⁴ See *Carlos Federspiel & Co. SA v. Charles Twigg & Co. Ltd.* [1957] 1 Lloyd's Rep 255-6 *per* Pearson J.

⁵ See *Wait v. Baker* [1848] 2 Ex 1, 8-9.

⁶ See, e.g., *Young v. Moeller* (1855) 5 E and B 755.

transferred and vested in the rightful holder of the bill of lading . A serious problem with this Act was the limitation of its scope: it applies only to contracts of carriage covered by a bill of lading and only if property passes in the way envisaged by section 1, which often does not happen.⁷ This problem, however, was addressed by the Carriage of Goods by Sea Act 1924, which repealed the Act of 1855 and which vests the right of suit in the transferee as soon as he becomes a lawful holder and continues until the bill is further transferred.⁸

As noted above, in the absence of any agreement to the contrary, the seller is considered to have performed his duty to deliver the goods where he makes them available to the buyer in the deliverable state at the time and the place stipulated in the contract so as to enable the buyer to obtain custody of, or control over, the goods purchased.⁹ In fact, there is no general rule requiring the seller to dispatch the goods to the buyer, for according to section 29 of the Sale of Goods Act 1979:

(2) Apart from any such contract, express or implied, the place of delivery is the seller's place of business, if he has one, and if not, his residence; except that, if the contract is for the sale of specific goods, which to the knowledge of the parties when the contract is made are in some other place, then that place is the place of delivery."

According to the provisions of this section, there is a presumption that in the absence of an agreement to the contrary, the place of delivery is the seller's place of business where the goods sold are not specific. In cases of the latter sort, i.e. where the goods are specific then the place of delivery is the place where the goods are known to be at the time of the contract. This means that in both the foregoing instances, it is the duty of the buyer to collect the goods, and not of the seller to send them to him unless, of course, otherwise expressly or impliedly provided by the parties in the contract of sale, in which case the delivery is to be made in accordance with the contractual terms.

⁷ See, e.g., *Leigh & Sullivan v. Aliakmon Shipping Co. Ltd. (The Aliakmon)* [1986] A.C. 785, [1986] 2 W.L.R. 902; *The Aramis* [1989] 1 Lloyd's Rep. 213, 218.

⁸ See for details, E M Clive, "Jus Quaesitum Tertio and Carriage of Goods by Sea" in *Comparative and Historical Essays in Scots Law* (Edinburgh Butterworths, Edited by D L Carey Miller and D W Meyers 1992) pp. 47-56; Michael D. Bools, *The Bill of Lading: A Document of Title to Goods, An Anglo-American Comparison* (London, Hong Kong, L L P, 1997), Ch. 4, pp. 85-99.

⁹ See *Wood v. Tassel* (1844) 6 Q.B. 234, 115 ER 90; *European Grain & Shipping Ltd. v. David*

Expenses of delivery

Nevertheless, it is to be noted that, like the French system,¹⁰ in the absence of an agreement to the contrary between the parties concerned, the seller, under English law, has a duty to do at his own expense what is necessary to put the goods into a deliverable state.¹¹ Accordingly, the seller in the case of sale of unascertained goods is obliged to appropriate to the contract goods in conformity with the quality and descriptions stipulated in the contract and the expense thereby incurred falls on him. Similarly, the responsibility of attending to such matters as acquiring a licence in an export sale,¹² or measuring of the goods where it is required by the contract, is laid on the seller which must be carried out at his own expense.¹³

Methods of delivery

The modes by which the seller can perform this duty of delivery under English and US law¹⁴ are generally the same as those of French¹⁵ and Iranian law;¹⁶ that is, he may effect this duty either by actual delivery, or by constructive delivery of the goods to the buyer or to an agent acting on behalf of the buyer.¹⁷

Transfer of physical possession of the goods is the most common method which is often used in domestic sale transactions. Depending on the agreement between the parties, the physical delivery may be made either to the buyer himself or to a third party nominated by him. In other words, the seller is considered to have sufficiently

Geddes (Proteins) Ltd. [1977] 2 Lloyd's Rep. 591.

¹⁰ See p. 81, post.

¹¹ Sale of Goods Act 1979, Section 29(6). One must remember that expenses referred to in this section is to be distinguished from the expenses of delivery itself. In the latter case depending on the terms of the contract either the seller or the buyer must bear the expenses necessary for delivering of the goods. See *Halsbury's Laws of England* (4th ed.) vol. 41, para 765.

¹² See also, *Mohanlal Hargovind of Jubbulpore v. Commissioner of Income Tax* [1949] A.C. 521.

¹³ Sale of Goods Act 1979, Section 29(6).

¹⁴ As to the provisions concerning modes of delivery under US law, see pp. 34-38, post.

¹⁵ See pp. 79-81, post.

¹⁶ See pp. 103-106, post.

fulfilled his contractual duty by delivering the goods to a third party nominated by the buyer rather than to the buyer himself, where there is an agreement between the parties to this effect.¹⁸

Where the buyer possessed the goods as the seller's bailee before entering into the contract of sale with the latter, then, as in French law,¹⁹ the mere consent of the parties is sufficient for performance of delivery of the goods to the former. As mentioned earlier, the seller may fulfil the duty of delivery by transfer of control of the goods to the buyer without physical possession (constructive delivery). There are various methods recognised in the law of sale by which possession of the goods can be transferred so as to effect the seller's duty of delivery as required by the law. As an illustration, the seller may discharge the duty placed on him by the law by giving the buyer the only effective means²⁰ of gaining access to the goods, for example a warehouse key.²¹

Another method of constructive delivery by the seller is to hand over the goods to a carrier for the purpose of transmission to the buyer for, as in French law,²² under English law there is a *prima facie* rule under which the duty of delivery is regarded to have been performed upon handing over of the goods to the carrier.²³ According to section 32(1) of the Act 1979 where such *prima facie* rule applies, it is irrelevant that the carrier may not have been nominated by the buyer and the contract of carriage negotiated by the seller,²⁴ who will be treated as the buyer's agent for the purpose of contract of carriage.²⁵ The complicated issue, however, is the question as to who is

¹⁷ See generally, *Benjamin's Sale of Goods* (5th ed. Edited by A. G. Guest *et al* 1997), pp. 384-389.

¹⁸ *Bull v. Sibbs* (1799) 8 T.L. 327, 328; *Four Point Garage Ltd. v. Carter* [1985] 3 All E.R. 12.

¹⁹ See p. 79, post.

²⁰ For the requirement of exclusive access; see *Dublin City Distillery Ltd. v. Doherty* [1914] A.C. 823, per Lord Atkinson, at pp. 843-44 (H.L. (Ir.)).

²¹ *Ellis v. Hunt* (1789), 3 Term Rep 464, 100 E.R. 679 (K.B.). This principle was also approved in the Canadian case of *Marshall v. Crown Assets Disposal Corporation* (1965) 5 D.L.R. (2d) 572, per Hogg J.A., at p. 576 (Ont. C.A.).

²² See pp. 83-84, post.

²³ See, section 32(1) of the Sale of Goods Act 1979. This section corresponds with section 31(1) of the Canadian Sale of Goods Act. See further *Volansky Clothing Co. v. Bannockburn Clothing Co. Ltd.*, [1919] 3 W.W.R. 913 (CAN); *Wait v. Baker* (1848), 2 Ex. 1, 154 E.R. 380. See also, *Benjamin's Sale of Goods*, *op. cit. supra.*, note 17 § 8-014, p. 387 and the cases cited there.

²⁴ As to how the seller may in certain F.O.B. contracts makes the shipping arrangements, see *Pyrene & Co. Ltd. v. Scindia Navigation Co. Ltd.* [1954] 2 Q.B. 402, per Devlin J.

²⁵ Sale of Goods Act 1979, Section 31(2). See also *The Albazero* [1977] A.C. 774 (H.L.) per Brandon

entitled to sue the carrier for damage done in transit. If the seller could sue, it would be because he was still the owner of the goods or (less likely) bore the risk and therefore it could be said that the seller makes the contract with the carrier as principal.²⁶ Nonetheless, as mentioned above, the rule in section 32(1) is only presumptive and is displaced where the parties in the contract of sale agree expressly or impliedly not to treat delivery to the carrier as delivery to the buyer. As an example, in *Beaver Specialty Ltd. v. Donald H. Bain Ltd.*,²⁷ a case dealing with the sale of nuts by a Vancouver seller to a Toronto buyer on F.O.B. Toronto terms, it was decided by the court that the place of delivery was Toronto rather than Vancouver, where the goods were physically handed over to the carrier.²⁸ For the same reason, the rule in section 31(1) should be displaced in those cases where the seller undertakes to deliver the goods at his own risk at the agreed destination.²⁹ Similarly, the presumptive delivery rule in section 32(1) of the Act does not apply where the carrier is the employee of the seller.³⁰ In these circumstances, delivery will take place when the goods are tendered to the buyer at the end of the transit, or, in contrast with the position in Iranian law, at least to someone in the buyer's establishment who presents a reasonable appearance of being entitled to accept delivery. In other words, only when delivery is thus made, will the seller be discharged from the liability for damages for non-delivery³¹ and, thereafter, he will be held as having complied with the condition normally concurrent with the buyer's duty to pay the price of the goods.³²

J., at pp. 785-86 (Q.B.) and Lord Diplock, at pp. 841-42 (H.L.).

It is to be remembered that although the carrier is ordinarily the agent of the buyer to receive the goods sold, he cannot act as the buyer agent to accept them, for it is no part of his function to examine the goods to see whether they are in accordance with the contract of sale. Moreover, although delivery to the carrier as such is regarded as delivery to the buyer's agent, the seller may still stop the goods in transitu before they are actually being handed over to the buyer. See *Cork Distilleries Co. v. Gt. Southern Railway* (1874) L.R. 7 H.L. 269, 277.

²⁶ See *The Albazero*, *supra.*, note 25, per Lord Diplock, at pp. 844-45.

²⁷ (1973) 39 D.L.R. (3d) 574; [1974] S.C.R. 903.

²⁸ See also *Stephens Bros. v. Burch* [1909] 10 W.L.R. 400 (Alta. S.C. en banc), 2 Alta L.R. 68 (CAN).

²⁹ See *Dunlop v. Lambert* (1839), 6 Cl. & F. 600, 7 E.R. 824.

³⁰ For in such circumstances the carrier is not acting as the buyer's agent. See *Volansky Clothing Co. v. Bannockburn Clothing Co. Ltd.*, [1919] 3 W.W.R. 913 (CAN).

³¹ Sale of Goods Act 1979, Section 51.

³² *Ibid.*, Section 28.

Constructive transfer of possession may also take place where the contract expressly or impliedly permits the transfer of possession “symbolically” by transfer of some document which allows the possessor thereof to obtain possession of goods (i.e., document of title); the seller’s duty to deliver is effected by handing such document over to the buyer. It is a matter of mercantile law or custom to determine whether or not such a document has such effect. It is established now that in a C.I.F. contract, the constructive delivery of the goods sold can be satisfied by transferring to the buyer a negotiable document generated by the carrier who, as bailee of the goods, undertakes to deliver them to the holder on due presentment of the said document. In such a contract, the goods are delivered, so far as they are physically delivered, when the seller puts them on board a ship at the port of shipment, while the documents are delivered when they are tendered to the buyer.³³ This distinction between the goods and the documents relating the goods in a C.I.F. contract has led to the proposition that the buyer’s right to reject faulty documents is distinguished from his right to reject defective goods with the consequent effects upon the provisions of the Sale of Goods Act 1979 relating to acceptance of delivery by him and its results.³⁴ What is beyond doubt, however, is that the seller’s duty in such contracts, as well as in “ex ship” contracts, is not to deliver the goods but appropriate documents.³⁵ In fact, the physical delivery of the goods by the seller in such instances is not sufficient for to constitute a performance to the buyer where the documents are not in order.³⁶ There is a difficult question as to whether in other kinds of contract of sale of goods, delivery of documents by which the holder is allowed to acquire the possession of the goods -such as a delivery warrant or order- is adequate for

³³ *Kwei Tek Chao v. British Traders & Shippers Ltd.* *Supra.*, note 2 at p. 486 per Devlin J. The bills of lading in law and fact represent the goods. Possession of the bill of lading by the buyer places the goods at his disposal: *Biddell Bros. v. E Clemens Horst & Co. Ltd.*, *supra.* note 2, at p. 956, per Kennedy L.J. In fact, bills of lading as negotiable instruments play an important role in mercantile law particularly in sale of goods at international level. See further Payne and Ivamy’s *Carriage of Goods by Sea* (13th ed. 1989) at pp. 81-140; Clive M. Schmitthoff, *Schmitthoff’s Export Trade: The Law & Practice of Interational Trade*, (9th ed., London: Stevens & Sons, 1990) pp. 590-593.

³⁴ *Kwei Tek Chao v. British Traders & Shippers Ltd.*, *supra.*, note 2.

³⁵ This is one of the instances where the presumption in section 32 (1) of the Sale of Goods Act 1979 is ousted by the parties to the contract of sale, since they intend delivery to be expressed through the documentary exchange. See *Wait v. Baker* (1848), *supra.* note 16, per Parke B. at p. 383.

³⁶ *Orient Co. Ltd. v. Brekke & Howlid* [1913] 1 K.B. 531.

performance of the seller's duty to deliver.³⁷ It is probable that the answer to this question depends on whether mercantile custom recognises such documents as effective as to transfer the property in the goods or the right to claim the property in the goods to the buyer by tendering of the documents to him.³⁸

Finally, where the goods are held by a third party bailee who has not issued a negotiable document of title, such as a bill of lading, then under the English system the goods are regarded as being constructively delivered as and when the bailee acknowledges to the buyer that he will thereafter hold them for the buyer. But the mere transfer of the seller's delivery order, or of a non-negotiable warrant or other document generated by the bailee to the buyer is not sufficient to constitute delivery.³⁹ In other words, where a warehouseman issues a non-negotiable receipt, or where the seller draws a delivery order on the bailee nominating the buyer as entitled to receive the goods from the bailee's premises, the bailee must attorn to the buyer before it can be said that new bailment with the buyer supersedes the old one with the seller.⁴⁰ If the bailee declines to comply with the seller's instruction, he will be held liable as against the latter for breach of obligation arising out of contractual bailment, but he has no liability as against the buyer before he attorns to the buyer. Even where a negotiable document of title involves, the passing of this document from the seller to the buyer, this may be seen as expressive of the principle of attornment⁴¹ as well as constructive delivery of goods in the form of a document. For the bailee in the document undertakes to deliver the goods to anyone who holds or is the named

³⁷ See e.g. *Laurie & Morewood v. John Dudin & Sons* [1926] 1 K.B. 223; *Mount (D.F.) Ltd. v. Jay & Jay (Provisions) Co. Ltd.* [1960] 1 Q.B. 159.

³⁸ It is to be noted that delivery of the goods may have different effects in different circumstances depending on whether the delivery is made by the seller to the buyer, to the carrier on behalf of the buyer, or to the carrier on behalf of the seller, or by the carrier to the ultimate consignee, i.e., the buyer, or delivery by the seller to the sub-purchaser from the buyer. In other words, any of these varieties of delivery may amount to performance of the duty to deliver by the seller, but they may have different effects as regards the rights and liabilities of the parties with regard to breach of contract, or the question of risk, or the right of the seller over and in respect of the goods where the buyer declines to pay the contractual price.

³⁹ See Sale of Goods Act 1979, Section 29(4); *Lackington v. Atherton* (1844), 7 Man. & G. 360, 135 E.R. 151 (C.P.); *Marshall v. Crown Assets Disposal Corporation*, *supra.*, note 15.

⁴⁰ *Waren Import Gesellschaft Krohn & Co. v. Internationale Graanhandel Thegra N.V.*, [1975] 1 Lloyd's Rep. 146.

⁴¹ *Leigh & Sullivan Ltd. v. Aliakmon Shipping Co. Ltd. [The Aliakmon]*, *supra.*, note 7, per Lord Brandon at p. 916.

indorsee of the document, and this continuing undertaking is transmitted by the bailee through the agency of the seller.

In those cases where the goods are still in the possession of the seller, he may also be held to have constructively delivered them to the buyer when he attorns to the latter by acknowledging that he holds the goods as the buyer's bailee.⁴² An attornment by the seller may take place even where the seller agrees to send the goods to the buyer's premises at a later date; the seller's undertaking with regard to dispatching of the goods can reasonably be construed as a collateral engagement.⁴³

It is worth pointing out that an attornment normally concerns identified goods. This is because an attornment in respect of an unidentified part of a bulk gives rise merely to a personal obligation and, consequently, the buyer does not acquire a possessory interest over the goods purchased.

Place of delivery

The provisions of English law concerning the place of delivery are identical to those of French law.⁴⁴ This means that the parties to a contract of sale under English law are free to choose the place where the goods are to be delivered by the seller.⁴⁵ The agreement as to the place of delivery may be made either expressly or by implication by the parties in the contract of sale.⁴⁶ In the latter case, the intention of the parties with regard to the place of delivery may be deduced from their contractual stipulation as to transport of the goods sold. For example, in the sale of goods involving carriage by sea, the duty of delivering the goods takes place when they are handed over to the carrier, therefore, in the absence of an agreement to the contrary

⁴² *Castle v. Sworder* (1861), 6 H. & N. 828, 158 E.R. 341 (Ex. Ch.); *Dublin City Distillery Ltd. v. Doherty*, *supra.*, note 20, *per* Lord Atkinson at p. 844.

⁴³ This interpretation was followed by the court in the Canadian case of *Rear v. McCullough* [1928] 2 D.L.R. 434; [1928] 1 WWR 716; 22 Sask LR 446 (CAN) where the seller of a horse agreed first to stable it over the winter months. It was held the buyer could have terminated this arrangement by calling for the horse at any time.

⁴⁴ See pp. 83-85, *post*.

⁴⁵ See *Benjamin's Sale of Goods*, *op. cit. supra.*, note 17 § 8-019, p. 389.

⁴⁶ Section 29(1) of the Sale of Goods Act 1979.

between the parties concerned, it is normally the port of loading which constitutes the place of delivery.⁴⁷

Where there is no stipulation as to the place of delivery in the contract of sale, then under section 29(2) of the Act, the seller must deliver at the place where the goods were at the time of the sale, if they are specific, provided that the purchaser knew of this location before entering into the contract of sale with the former. In contrast with Iranian law, where the goods sold are unascertained, delivery takes place at the seller's place of business if he has one, and if not, at his residence.⁴⁸ Like French law, the Sale of Goods Act 1979, however, does not provide where delivery is to take place if the seller has more than one place of business. This question may cause significant problems to the parties concerned particularly in an international sale of goods where the seller's places of business are situated in different countries. One answer to the question is to consider the seller's main place of business as the place where the goods are to be delivered. Nonetheless, this proposition does not obviate the foregoing problem in those rare circumstances where there is no evidence to differentiate between the seller's places of business. One solution to this problem is to deliver the goods at that place of business which has closer links with the contract than the other seller's places of business.⁴⁹ Alternatively, it might be justifiable to require the seller to deliver at his nearest place of business to the buyer where the buyer was not aware that the seller has different places of business at the time of the conclusion of the contract.

Time of delivery

⁴⁷ Under section 10 of the Swedish Sale of Goods Act, delivery of goods takes place when the goods are handed to the carrier where the parties agreed that the seller shall send the goods to the buyer if no other detail with regard to the place of delivery is being settled between them, but if the goods sold are to be sent by ship delivery occurs when the goods are placed on the railing of the Ship. See Stig Strömholm (Editor) *An Introduction to Swedish Law* (1981, Boston, Frankfurt), vol. 1 at p. 213.

⁴⁸ The rules as to the place of delivery under the Law of South Africa are identical with English law. See Mackeurtan's *Sale of Goods in South Africa* (5th ed. Edited by G.R. Hackwill 1984) at p.77 and authorities there cited. The same provisions are applicable to the contract of sale between the parties under section 9 of the Swedish Sale of Goods Act. See Stig Strömholm (Editor) *An Introduction to Swedish Law* (1981, Boston, Frankfurt), vol. 1 at p. 212.

In accordance with section 10(2) of the Sale of Goods Act 1979, whether a stipulation as to time of delivery of the goods is, or is not, of the essence of the contract depends on the terms of the contract between the parties concerned. This means that the parties may stipulate in their contract that the time fixed by them for performance of the seller's duty with regard to delivering of the goods is to be of the essence of the contract, so that the seller's failure to deliver at that time would be breach of condition which entitles the buyer to refuse to take the goods and to treat the contract as repudiated. In other words, in contrast with the French and the Iranian legal systems, under English law the buyer cannot automatically use the right to reject the goods for the seller's failure to deliver them at the time stipulated in the contract, unless rejection of the goods can be justified by reference to the terms of the contract, as, under the latter legal system, "there is no presumption or rule of law that stipulation as to the time of delivery is of the essence of a contract of sale of goods."⁵⁰ Nevertheless, McCardie J. in *Hartley v. Hyman*⁵¹ suggested that the provision of section 10(2) is in conflict with section 62(2) of the Sale of Goods Act 1979 and that the common law and law merchant referred to in the latter section did not look at the terms of the contract but at the nature of a contract and character of the goods being sold. In ordinary commercial contracts for the sale of goods the rule clearly was that time was *prima facie* of the essence of the contract with respect to the seller's duty of delivery of the goods sold.⁵² Therefore, the condition which relates to and affects the time at which the seller is to deliver the goods may well be essential to the contract between the parties concerned even if they fail to state this in the words of their contract.⁵³ Under this view, in other words, in a commercial contract the seller's failure to deliver the goods within the period of time stipulated in

⁴⁹ For the problem associated with this approach under the CISG, see pp. 144-145, post.

⁵⁰ See *Benjamin's Sale of Goods*, *op. cit. supra.*, note 17 at p. 359 § 8-024, and the sources cited thereto.

⁵¹ [1920] 3 K.B. 475, 483.

⁵² *Ibid.*, per McCardie, J., at p. 484. According to him:

"In ordinary commercial contracts for the sale of goods the rule clearly is that time is *prima facie* of the essence with respect to delivery."

⁵³ *Bowes v. Shand* (1877) 2 App. Cas. 455; *Toepfer v. Lenersan Poortman N.V.* [1980] 1 Lloyd's Rep.

the contract can be considered as a breach of condition upon which the buyer is justified to reject the goods and to treat the sale as repudiated.⁵⁴ This view, however, has not been applied by all courts, some of which see a stipulation concerning the time of delivery as a mere “innominate” or “intermediate” term rather than as being of the essence of the contract. The latter approach suggests that the buyer may reject the goods and repudiate the contract only if the seller’s delay in delivering the goods is so prolonged as to deprive him (the buyer) of a substantial part of the benefit which he should have received from the contract had the contract been performed at due time.⁵⁵ This approach is reinforced by section 62(2) of the Sale of Goods Act 1979 (as amended) under which any provision which is inconsistent with those of the Act is invalid. In other words, in the absence of an agreement to the contrary by the parties, the time of delivery stipulated in the contract should not be considered as an essence of the contract, as it is inconsistent with the provisions of section 10(2) of the Act 1979.

In contrast with this view, however, the time of delivery in a contract of sale involving carriage of goods by a ship before a fixed date or within a stipulated period is, unlike the position in French⁵⁶ and Iranian law, generally regarded by the English courts as being the essence of the contract, so that any deviation from it justifies the buyer in treating the contract as repudiated, even though the breach does not cause any damage to him. This was the case, for example, in *Bowes v. Shand*⁵⁷ where the seller agreed to ship a quantity of Madras rice during the month of March and/or April. After finding that the bulk of the goods were shipped at the end of February and only about one eighth of them were shipped during March, the court ruled that the buyers were entitled to reject the goods, although it was conceded that there was no difference between the rice actually shipped and any rice which might have been

143; *Bunge Corpn. v. Tradax Export S.A.* [1981] 1 W.L.R. 711, 716, 719.

⁵⁴ *Coddington v. Paleologo* (1867) L.R. 2 Exch. 193, 196-197; 15 WR 961; 15 LT 581.

⁵⁵ *Tradax Export SpA. v. Italgrani Di Francesco Ambrosio* [1986] 1 Lloyd’s Rep. 112. This view is followed in *Benjamin’s Sale of Goods*, *op. cit. supra.*, note 17 § 8-025, pp. 391-392.

⁵⁶ As to the position under French law, see pp. 84-87, *post*.

⁵⁷ (1877) 2 App. Cas. 455. The court in this case made it clear that early shipment is just as much a breach as late shipment.

have been shipped during the period agreed between the parties (i.e., during March or/and April).

It is accepted that, when a buyer wishes to repudiate a contract on the ground of lateness of delivery, he must do so immediately, provided, of course, that the time of delivery is, in the circumstances, of the essence of the contract. A buyer may not repudiate a contract on the ground that he wishes to get out of a bad bargain. However, a buyer may, in practice, try to escape such a bargain by relying on lateness of delivery to justify his repudiation. One might therefore criticise such carriage of goods by sea cases on the ground that the buyer is allowed to escape from a bad bargain as a result of a highly technical breach of the contract by the other party. The criticism, however, seems to be untenable, for the allegation that the innocent party has repudiated the contract because he wants to escape from a bad bargain is not necessarily true where the buyer, for example, complains of the failure to give notice on time or other similar breaches. And it is undesirable to allow a party to litigation to raise issues about the motives which have led the other party to act in a certain way, for examination of such motives often leads to very serious and difficult factual disputes. Moreover, under the principle of freedom of contract, it is up to the parties themselves to predict any such technical breach by one party by inserting a suitable term in their contract to prevent the other party from using it to escape from a bad bargain. The duty of the courts is simply to enforce the agreement between the parties concerned, not to investigate their motive in agreeing on the terms of the contract.

If, in the foregoing instances, there is a stipulation which allows the seller to deliver within a specified period, e.g. shipment during August, then the seller may deliver at any time within that period and he will not be held liable to the buyer in respect of breach of the duty to deliver the goods until after the expiry of that period, except where the last day of this period is a non-working day (e.g., a bank holiday), in which case the seller will not have an extension of time to the next day.⁵⁸

⁵⁸ See e.g., *Jacobson Van Den Berg & Co. v. Biba Ltd.* (1977) 121 Sol Jo 333.

Where no time for delivery of the goods has been stated in the contract, the seller, under section 29(3) of the Act, must send them within a reasonable time.⁵⁹ The same rule applies to the cases where the seller does not undertake to dispatch the goods to the buyer, but to make them ready for the collection by the latter. In other words, it is a general rule of English law that the seller is to deliver the goods to the buyer within a reasonable time where the contract is silent as to the time of delivery.⁶⁰ What is a reasonable time is a question of fact.⁶¹ The question of reasonable time may be affected by the usage of trade.⁶² It could also be extended beyond its normal span if the seller's fault is not the cause of hampering the performance of the duty in delivering the goods.⁶³

Where, under the terms of the contract, delivery is to take place upon performance of some act by the buyer, as in the cases where the buyer is bound to supply containers for the goods or to provide the means for their carriage, the time of delivery is the time when the stipulated act is performed by the buyer, and the seller will be in default only if he fails or delays to deliver the goods within a reasonable time after performance of the act by the former.⁶⁴ In contrast with French law,⁶⁵ the buyer under English and US law is not required to give notice, formal or informal, to the seller demanding him that he deliver the goods. In other words, unlike the French rule, mere delay in performing the duty of delivery within the time stated in the contract is sufficient to grant the buyer a right to invoke the remedies provided by the law for breach of the duty to deliver. The same provisions apply where no time as to delivery of the goods has been provided for in the contract: the buyer need not request the seller to deliver the goods and a mere delay on the part of the latter in

⁵⁹ For the provisions of this section, see Appendix II.

⁶⁰ *Jones v. Gibbons* (1853) 8 Ex. 920, 922; *Hartwells of Oxford Ltd. v. British Motor Trade Association* [1951] Ch. 50. This rule corresponds with the provisions of CISG, Article 33 (c). In contrast with this rule under China's legal system, the parties cannot enter into a valid contract without specifying a time limit for delivering of the goods by the seller. See Henry R. Zheng, *China's Civil and Commercial Law* (1988) at p. 77.

⁶¹ Sale of Goods Act 1979, Section 59.

⁶² *Bradely & Sons v. Colonial Continental Trading Co.* (1964) 108 S.J. 599.

⁶³ *Re Carver & Co. and Sasson & Co.* (1911) 17 Com. Cas. 59; *Hartwells of Oxford Ltd. v. British Motor Trade Association*, *supra.*, note 60.

⁶⁴ *Compagnie Commerciale sucres et Denrees v. C. Czarnikow Ltd.* [1990] 1 W.L.R. 1337; *Norman v. Ackland* [1915] S.A.L.R. 177.

delivering within a reasonable time would be a breach entitling the buyer to treat himself as discharged from any further liability under the contract of sale.⁶⁶ An exception to this general rule is where the seller has agreed to deliver the goods to the buyer “on request” or “as required” or on similar terms, in which case he is not bound to deliver unless and until the buyer has given him a notice requesting him to do so.⁶⁷ However, once the seller has received such a request, then he must deliver the goods as soon as the buyer is ready and willing to receive them. Where the time for the buyer’s request in delivering the goods has not been limited or fixed by the contract of sale, there is a general rule which precludes the seller from discharging himself from liability under the contract against the buyer by the fact that the latter has not given any notice requiring delivery of the goods. Instead, like French law, the seller, after the expiry of a reasonable time, may give notice to the buyer reminding him of the requirement under the contract; and if the buyer fails to request delivery of the goods within a reasonable time after receiving the notice, the former may treat himself as discharged from further liability under the contract vis-à-vis the buyer.⁶⁸

It is to be noted that, under section 28 of the Sale of Goods Act 1979, delivery of the goods and payment of the price are concurrent conditions. The seller must be ready and willing to give possession of the goods to the buyer in exchange for the sale price agreed between the parties, and the buyer must be ready and willing to pay the said price in exchange for possession of the goods. In other words, like the French⁶⁹ and the Iranian⁷⁰ systems, English law does not hold the seller liable for delay in delivery of the goods where the buyer declines to pay the contractual price,

⁶⁵ See pp. 85-86, post.

⁶⁶ *Thomas Borthwick (Glasgow), Ltd. v. Bunge & Co., Ltd.* [1969] 1 Lloyd’s Rep. 17, 28.

⁶⁷ *Jones v. Gibbons*, *supra.*, note 49; *G.N. Ry. v. Harrison* (1852) 12 C.B. 576. According to the case of *Bowdell v. Parsons* (1808) 10 East 359; 103 E.R. 811, even where the seller does not receive such a request, he may, nevertheless, be in breach of the contract if he disposes of the goods or if he declares to the buyer that he is not willing to deliver them to the latter. See further, the Canadian case of *Wingold v. William Looser & Co.* [1951] 1 D.L.R. 429.

⁶⁸ *Pear Mill Co. Ltd. v. Ivy Tannery Co. Ltd.* [1919] 1 K.B. 78, 81.

⁶⁹ See pp. 91-92, post.

⁷⁰ See pp. 121-122, post.

unless the parties have agreed on making delivery a condition precedent, in which case the seller is bound to deliver the goods on the time states in their agreement.⁷¹

Quantity of the goods delivered

Like the civilian system⁷², the seller under English law is required to deliver the correct quantity of goods. Section 30(1) of the Sale of Goods Act 1979 provides:

“Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts the goods so delivered he must pay for them at the contract rate.”

According to these provisions, any shortfall in quantity of the goods delivered to the buyer may permit him to treat the whole contract as repudiated unless the shortfall in the quantity is trivial, in which case the UK Sale of Goods Act 1979 (as amended by section 30(2A) of the Act 1994) precludes him from rejecting the goods⁷³. These provisions are identical with those of the French system.⁷⁴ The only difference between the two systems is that while according to French law the amount of the shortfall or excess in the quantity of the goods which is designated to be disregarded by the buyer is one-twentieth of the total goods sold, there is no precise figure under English law to specify the extent of the shortfall or excess in the quantity of the goods delivered which could not be regarded as a breach to justify the buyer to treat the whole contract as an end. Instead, section 30(2A) of the 1994 Act, amending the Sale of Goods Act 1979, states that a non-consumer buyer may not reject the whole of the goods delivered “if the shortfall or, as the case may be, excess is so slight that

⁷¹ For as Lord Halsbury states, in the absence of an agreement to the contrary by the parties, delivery and payment must take place together. See *Forrest & Son Ltd. v. Aramayo* (1900) 83 L.T. 335 at p. 338

⁷² See, Article 384 of the Iranian Civil Code. Similarly, under Article 1618 of the French Civil Code, the buyer may disavow the sale provided that the amount of the shortage in the goods delivered is more than one-twentieth of the amount of the goods stated in the contract. Where the shortage is less than one-twentieth of the amount of the goods provided in the contract, the buyer cannot disavow the sale but is entitled to diminish price at the contract rate.

⁷³ The same conclusion could be reached by referring the case to the maxim of *de minimis non curat lex* (the law pays no attention to trifles). See P.S. Atiyah, *The Sale of Goods* (9th ed. 1995), at pp. 106-107 and the cases quoted there.

⁷⁴ See French Civil Code, Article 1618.

it would be *unreasonable* for him to do so.”⁷⁵ In other words, under the latter system, the courts have a discretionary power to decide objectively whether or not in the circumstances surrounding each case the shortfall or excess in quantity is significant enough to allow the buyer to reject the whole goods. It seems that while this approach may, to a limited extent, be the cause of uncertainty among the parties, it also offers the advantage of flexibility, which is necessary in dealing with the issues concerning a commercial transaction.

Unlike some modern systems, section 31(1) of Act 1979 states:

“Unless otherwise agreed, the buyer of the goods is not bound to accept delivery thereof by instalments.”

This means that, unless otherwise provided by the contract, the seller, in the case of shortfall in the quantity of the goods is precluded from discharging himself of liability for breach of the contractual duty to deliver by delivering the remainder later if the buyer decides not to accept the goods delivered in more than one load.⁷⁶ The provisions of this section seem quite justifiable where delivery of the goods by instalments may cause unreasonable inconvenience or unreasonable expenses to the buyer. Nevertheless, it seems that there are no justifiable grounds to prevent the seller from delivering the goods by instalment where he has reasonable evidence to indicate that delivery by instalment does not cause any inconvenience to the buyer. This will be particularly the case if the time set out by the parties for delivery has not expired or if the time of delivery is not essential to the buyer.⁷⁷

The wording of section 31(1) also suggests that the buyer may decide to accept the goods delivered in more than one load even where there is no agreement to this effect in the contract between the parties. However, whether the buyer can refuse to accept the loads of goods which are delivered following acceptance of the first load, where the time for delivery of the goods stipulated by the contract has not expired,

⁷⁵ Italics added.

⁷⁶ *Behrend & Co. Ltd. v. Produce Brokers Co. Ltd.* [1920] 3 KB 530; *Gill & Duffus SA v. Berger & Co. Inc* [1983] 1 Lloyd's Rep 622.

⁷⁷ It is to be noted, however, that if the buyer accepts an insufficient quantity of goods delivered by the seller, then he may not reject the seller's offer to deliver the shortfall in quantity if the time for delivery has not expired. See, *The Kanchenjunga* [1990] 1 Lloyd's Rep. 379, at p. 399, per Lord Goff

and if so, whether he is entitled also to repudiate the whole contract for the breach of the duty to deliver where despite the following deliveries the amount of the goods delivered is less than what was provided for in the contract, are questions which have been left open by the Sale of Goods Act 1979. Further questions may arise when the buyer chooses to accept the first load of the goods in the hope that the seller will deliver the remaining goods at a later stage before expiry of the time for delivery stated in the contract, but the latter fails to deliver the remaining part in due course. The issue, in such circumstances, is again whether the seller's default in delivering the remaining part of the goods justifies the buyer in treating the whole contract as at an end, with the consequence that he is to return that portion of the goods which has been duly delivered to him or he is only entitled to sue the seller for compensation for the shortfall in quantity of the goods delivered to him. These, and a variety of similar questions arising from the provisions of section 31(1) of the Act, indicate that these provisions at the best are ambiguous and likely to cause much uncertainty and confusion among the parties concerned and, accordingly, should be duly amended by the legislators.

In contrast with Article 1619 of the French Civil Code, under which in the event that the quantity of the property delivered by the seller is larger than specified by the contract, the buyer has an option either to disavow the contract or to pay to the former an additional price for the excess in quantity at the contract rate, section 30(2) of the Act 1979 states that, in such instances, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole goods delivered to him and, therefore, treat the contract as repudiated. However, according to section 30(3) of the same Act, he may also accept all the goods delivered, in which case the law requires him to furnish the seller with an additional price at the contract rate. Accordingly, there is a fundamental difference between the two legal systems; that is, unlike the English system, the French Code, in the case of an excess delivery, does not permit the buyer to divide the goods delivered by retaining the part included in the contract and rejecting the rest.

of Chieveley. See further, *Benjamin's Sale of Goods*, *op. cit. supra.*, note 17, § 8-048, pp. 401-402.

It has been suggested that the provision of section 30(3) of the 1979 Act in granting the buyer an option to accept and to pay for any excess in quantity of the goods delivered is based on the presumption that delivery is a counter-offer by the seller which may be accepted by the buyer by taking of the goods.⁷⁸ The fundamental problem with this suggestion is that it ignores the fact that the parties have already made a valid contract and that this contract has been breached by the seller. Secondly, it seems wrong to determine the legal status of the parties by reference to this assumption, particularly where the buyer knew, or he should not reasonably have been unaware by the surrounding circumstances of the case, that the seller mistakenly delivered a quantity of goods larger than he contract to sell.⁷⁹ Finally, treating of excessive delivery by the seller as a counter-offer is inconsistent with the buyer's option under section 30(2), under the terms of which he can accept the goods included in the contract and reject the rest unless it could be assumed that the seller agrees by his counter-offer to permit the latter to accept any distinct part of the goods delivered and to reject the rest.⁸⁰ This assumption, however, is not in conformity with the provisions of section 30(2A) under which the seller must accept the goods delivered if the shortfall or surplus in quantity is not substantial.

Furthermore, one may criticise both French and English law for their approach in granting the buyer an option to reject the whole goods for an excess in their quantity for, as Professor Atiyah pointed out in such instances, "there seems no obvious reason why the buyer should not be required to accept that part which should have been delivered"⁸¹ to him. In other words, it is unjust to hold the seller liable for breach of the duty of delivery merely because the quantity of the goods delivered is larger than what was contracted to sell. It is equally unjust to allow the buyer to

⁷⁸ *Hart v. Mills* (1846) 15 M & W 85. See further, P.S. Atiyah, *The Sale of Goods*, *op. cit.*, *supra.*, note 73, at p. 106.

⁷⁹ As in the Iranian and the French systems, under section 62(2) of the Sale of Goods Act, the seller's mistake in such cases prevents the conclusion that the parties have made a new valid contract in respect of the excess in quantity.

⁸⁰ It appears that this assumption has been adopted by the common law. See *Champion v. Short* (1807) 1 Camp 53; *Hart v. Mills*, *supra.*, note 63 ; and see also Hudson, "Dividing Acceptances in Sale of Goods" (1976) 92 *Law Quarterly Review* 506.

⁸¹ P.S. Atiyah, *The Sale of Goods*, *op. cit.*, *supra.*, note 73, at pp. 105-106. This is the rule under the Iranian legal system. See Article 384 of the Iranian Civil Code.

accept the excess in quantity at his will at the contractual rate, where both the excess in quantity and the market price of the goods are substantially higher than what was set in the contract, particularly if the seller can show that he has delivered the goods inadvertently.

In short, the options given to the buyer in the case of excess in quantity delivered by the seller under both French and English law, seem unjustifiable and unreasonably favour the buyer. This problem has been appropriately avoided by Article 384 of the Iranian Civil Code under which, in contrast with the foregoing systems, the buyer, in such instances, is required to accept the amount included in the contract and to return the surplus to the seller.⁸²

The buyer's remedies under English law

There is variety of ways in which the seller may be in breach of the contract with the buyer. He is in breach of the contract when he fails to deliver the goods sold, when he delivers the wrong quantity or the wrong quality of goods, or when he delivers the right quantity and quality of goods but at a time later than the time stipulated by the parties. In contrast with the civilian systems, the buyer's prime remedy in all these instances is to maintain an action for damages against the seller. The buyer's action for damages may take one of two forms; it may be an action for non-delivery under section 51 of the Act 1979 or it may be an action for breach of an express or implied term in respect of the goods sold. The buyer may also claim damages for non-delivery where the seller completely fails to deliver the goods sold, or where the buyer rightfully rejects the goods delivered to him.

The right to reject

The buyer's right to reject the goods and to repudiate the contract depends on whether the contractual obligation breach by the seller is classified as a condition or

as a warranty within the context of the Sale of Goods Act 1979. In accordance with section 11(3) of this Act, the breach of a condition entitles the buyer to reject the goods and recover the price paid to the seller while in the case of a breach of a warranty the buyer may only claim damages for the breach.⁸³

Ordinarily in law “condition” means an operative fact, some event or contingency that may or may not happen. In its broadest sense, “condition” may include within its meaning the performance or non-performance of some material promise which is made by the promisor and whereupon he is bound to act. It is this broad sense in which the Sale of Goods Act 1979 uses the term.⁸⁴ “Warranty”, on the hand, is restricted to “collateral agreements” with reference to the goods sold.⁸⁵

The terms implied into the contract by the Act with respect of quality and quantity of the goods are classified under English law as conditions,⁸⁶ the breach of which, subject to section 15(A) of the Sale of Goods Act 1979 (as amended)⁸⁷ entitle the buyer to repudiate the contract. Nonetheless, the buyer may treat such a breach as a breach of warranty and therefore sue the seller for the damages sustained as a consequence of the breach.

In contrast with the statutory implied terms which are conditions under the Sale of Goods Act 1979, the express terms provided by the parties in the contract are generally treated as innominate terms whose consequences depend on the actual outcome of the breach. This means that the buyer may repudiate the contract for breach of a term of this character only if the nature and consequences of the breach is so serious as to justify this result.⁸⁸ This rule complies with the provisions of section 15A of the Act 1979 (as amended) which limits the buyer’s right to reject for a

⁸² See pp. 118-120, post.

⁸³ Sale of Goods Act 1979, Section 61.

⁸⁴ *Ibid.*, Section 11(3).

⁸⁵ *Ibid.*, Section 61. The term ‘collateral’ used in this section should not be taken as meaning that a warranty is a term outside the contract. See Stoljar, “Conditions, Warranties and Descriptions of Quality in Sale of Goods-I” (1952) 15 *Modern Law Review* 425, 430-432.

⁸⁶ The body of Sale of Goods Act 1979 (as amended) uses the word ‘term’ instead of ‘condition’ but provides in Schd. 2 that in England and Wales and Northern Ireland the implied terms are conditions (save in the cases of sections 12(2), (4) and (5)).

⁸⁷ According section 15(A), in a non-consumer sale, the buyer may not reject the goods for a breach on the part of the seller of a term implied by section 13, 14 or 15 if the consequences and nature of the breach are so slight that rejection would be unreasonable.

shortfall, or his right to reject all the goods for an excess, if the shortfall or the excess “is so slight that it would be unreasonable for him to do so”.

The difference between the UCC and English law in this respect is that, in contrast with the latter system, the terms implied in a contract under the UCC are all considered as warranties, the breach of which, irrespective of their gravity, discharges the buyer from his liability under the contract. The same rule also applies with respect of the express terms provided by the parties in the contract; any non-conformity in the goods with the express warranties, however trivial, entitles the buyer, at least nominally, to treat the contract as an end and to recover the price paid to the seller.⁸⁹

Loss of right to reject and its consequence

As in other legal systems under consideration, where the buyer has a right to reject the goods either because of a breach of a condition or because of the nature and consequences of a breach of an innominate term, section 35 of the Act 1979 requires him to exercise this right within a reasonable period. In accordance with section 35(5) of this Act, the questions that are material in determining whether a reasonable time has elapsed include whether the buyer had a reasonable opportunity for examining of the goods to ascertain their non-conformity with the contract. This means that the buyer will lose the right to reject the goods if he fails to do so within a reasonable period after detection of the non-conformity or, after the time when he should have reasonably detected the non-conformity.⁹⁰

Furthermore, the buyer who intimates to the seller that he has accepted the goods,⁹¹ or who does any act with the goods which is inconsistent with the seller's ownership,⁹² can no longer exercise the right to reject the goods and to repudiate the contract. This is because, in such instances the buyer is deemed to have accepted the

⁸⁸ See, e.g., *Cehave NV v. Bremer Handelsgesellschaft (The Hansa Nord)* [1976] QB 44.

⁸⁹ See p. 61-64, post.

⁹⁰ *Bernstein v. Pamson Motors (Golders Green) Ltd.* [1987] 2 All ER 220.

⁹¹ Sale of Goods Act 1979, Section 35(1)(a).

⁹² *Ibid.*, Section 35(1)(b).

goods and the acceptance, in contrast with the UCC,⁹³ precludes him from rejecting them later under English law. Nonetheless, section 35(6)(b) of the Act 1979 (as amended) makes it clear that the buyer is not deemed to have accepted goods merely because the goods are delivered to another under a sub-sale or other disposition.

The rule under section 35(1)(b) of the Act 1979 under which the buyer is deemed to have accepted the goods where he does an act which is inconsistent with the seller's ownership, may suggest that the property in the goods cannot pass to the buyer until he accepts them. However, this suggestion is not correct for, as Devlin J. pointed out the passing of the property to the buyer is merely conditional where despite the passing he retains the right to reject the goods.⁹⁴

The buyer who loses the right to reject may only claim damages for non-conformity of the goods with the contract.

The right to recover damages caused by the breach

Whether the buyer who rejects the goods or to retain the goods either because he loses the right to reject or because he chooses to treat the breach of the condition as a breach of warranty, may also claim damages which he has sustained as a consequence of the breach. Nonetheless, the loss which the buyer may recover in the cases of non-delivery or rejection of the goods differs from the one which is recoverable by him for the breach of a warranty.

Damages for non-delivery and rejection of the goods by the buyer

As pointed out above, the buyer may maintain an action of damage for non-delivery both where the seller fails to deliver the goods sold and where the buyer justifiably reject them. The rules for assessment of such damages have been generally set by section 51 of the Act 1979 as follows:

“(1) Where the seller wrongfully neglects or refuses to deliver the goods to the

⁹³ As to the effect of acceptance on the buyer's right to reject under UCC, see pp. 63-65, post.

⁹⁴ *Kwei Tek Chao v. British Traders & Shippers Ltd. supra.*, note 2 at p. 487.

buyer, the buyer may maintain an action against the seller for damages for non-delivery.

(2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract.

(3) Where there is an available market for the goods in question the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered or (if no time was fixed) then at the time of the refusal to deliver."

Under these provisions, the buyer's damages, in contrast with the UCC,⁹⁵ will be assessed primarily by reference to the market price of the goods at the time and at the place⁹⁶ when and where they ought to have been delivered. Therefore, unlike the cover formula under section 2-712 of the UCC, the court under English law does not pay any attention to the actual loss of the buyer resulting from purchasing of replacement goods. This means that if an aggrieved buyer made a cover purchase, there is no assurance that the court will measure the market at or near the time when he made his purchase, and, accordingly, the court's contract-market differential formula depending on whether the market price of the goods after the time of delivery falls or rises may over or -under- compensate him. Moreover, unlike the civilian systems, the mere fact that the buyer has already contracted to resell the goods to a third party at a price higher or lower than the market price at the date when delivery should be made, does not alter the general rule of contract-market differential in assessing of the damages caused by the breach.⁹⁷ It is argued that the purpose of damages for the non-delivery is to compensate the buyer for the additional cost of buying in the market and therefore the buyer in the case of non-delivery must buy in the market in order to fulfil his obligations against the third party under a sub-sale.⁹⁸ The problem with this argument is that it does not take into account the fact that the buyer cannot always purchase substitute goods immediately after the breach, either because no such a market is readily available to him at the place of delivery or because he is not able to afford to pay the market price. Even in the absence of these

⁹⁵ Under the UCC, the buyer's prime remedy is to claim cover damages under section 2-712. For more details, see 65-68, post.

⁹⁶ *Attorney-General of the Republic of Ghana v. Texaco Overseas Tank Ships Ltd* [1993] 1 Lloyd's Rep 471.

⁹⁷ *Rodocanachi v. Milburn* (1886) 18 QBD 67; *Williams v. Agius* [1914] AC 510.

⁹⁸ P. S. Atiyah, *The Sale of Goods*, *op. cit.*, *supra.*, note 73, p. 482.

problems, it seems unreasonable to suppose that a buyer can in practice buy substitute goods in the market on the very day on which the breach takes place, for the buyer may often wish to consider his position, or to negotiate with the seller on the breach before purchasing substitute goods. Moreover, there are many instances where it takes some time for the buyer to negotiate a new contract to buy substitute goods. These are indications that generally there is some delay before the buyer can buy substitute goods, and therefore, he is liable against the third party for the delay in delivering under his sub-sale. This means that the loss recoverable under the contract-market price differential formula under section 51 is not often adequate to compensate the aggrieved buyer against the damages caused by the breach. This is so even if the seller has fraudulently breached the contract.

Nonetheless, under section 54 of the Act 1979, the buyer in some exceptional cases may claim damages representing the loss he has sustained on sub-sales which, because of the seller's breach he has been unable to fulfil. In other words, while under section 51 of the Act 1979 the aggrieved buyer may cover the loss which naturally and directly resulted from the breach, section 54 of this Act allows him to recover the loss which are not directly and naturally followed from the breach, but the loss arising from special circumstances of which the parties were aware at the time of the contract. The provisions of sections 51 and 54 of the 1979 Act under which these two different types of damages are recoverable correspond to the first and second rules which were derived from the decision in *Hadley v. Baxendale*⁹⁹ which states:

“Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only

⁹⁹ (1854) 9 Ex 341.

be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract.”¹⁰⁰

On this basis, in one case the court held that the buyer was entitled to claim damages for the freight which he had to pay despite non-delivery of the goods, as the seller could reasonably contemplate that the buyer had to pay the freight to the carrier.¹⁰¹ Clearly, the buyer who claims damages on the basis of difference between the contract price and the resale price has, under the second rule in *Hadley v. Baxendale*, to show that the seller was aware or ought to have been aware, of the buyer's intention to resell.¹⁰² However, the fact that sub-sales were reasonably contemplated by the seller has been held by some court not to be enough to render the seller liable under the contract-resale price differential formula. In *The Arpad*,¹⁰³ for example, Maugham LJ stated:

I suppose most vendors of goods and most carriers might be taken to know that if the purchaser or consignee is a trader the goods will probably be sold, or be bought for sub-sale; but the authorities seem to show conclusively that something more than that is necessary to enable the damages to be assessed by reference to a contract of sub-sale entered into before the date of delivery.”

On this basis, it appears from the later decision by the House of Lords that the correct test is the probability of the loss occurring, for a consequence could be foreseeable but unlikely to occur.

Furthermore, it has been suggested that the contract-resale price differential formula is applicable only if the buyer resells the specific goods which he agreed to buy under the first contract with the seller, presumably because only in these instances he will not be able to fulfil his obligation under the sub-sale if the seller fails to deliver the goods.¹⁰⁴ A criticism of this proposal is that it does not consider the damages which the aggrieved buyer may have to suffer as a consequence of the delay which often follows after the breach and before he purchases substitute goods.

¹⁰⁰ *Ibid.* at 354-355, 156 Eng. Rep. at 151. This decision was followed by the House of Lords in *Koufos v. Czarndnikow Ltd (The Heron II)* [1969] 1 AC 350, 386 per Lord Reid.

¹⁰¹ *E Braude (London) Ltd v. Porter* [1959] 2 Lloyd's Rep 161.

¹⁰² *Seven Seas Properties v. Al-Esso* [1993] 3 All ER 577.

¹⁰³ [1934] P 189, 230

¹⁰⁴ See, e.g., P. S. Atiyah, *The Sale of Goods, op. cit., supra.*, note 73, p. 486; A. I. Ogus, *The law of*

Even in the absence of such a delay, it seem unreasonable to deprive the buyer of the right to recover damages on the basis of the contract-resale price differential formula merely because the goods sold are not specific and therefore he may purchase substitute goods in order to fulfil the sub-sale. This is because, the time and the capital which are necessary for purchasing the substitute goods, may be used by the buyer to make a further profit by dealing with another person, while he will unjustly loose this new profit if he has to buy the substitute goods for the purpose of the fulfilling of the sub-sale.

Damages for breach of condition , warranty or innominate term

In accordance with section 53 of the Act 1979, the buyer may maintain an action for breach of a warranty where the breach by the seller does not amount a breach of a condition or where the buyer elects (or is compelled) to treat any breach of condition or innominate term as a breach of warranty. The rule for assessment of such damages has been set by section 53(2) as “the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.”

Damages for delay in delivery

In the case of late delivery, for example, the method of assessing the damages depends on whether the buyer is buying the goods for use or he is buying to resell them. In the former case, the damages will be assessed on the basis of the cost which the buyer has to sustain for hiring of substitute goods during the delay, while in the later case, the buyer is entitled to recover as damages the difference between the market price at the time when the seller should have delivered the goods and the market price at the time when he actually delivered them. In *Koufos v. Czarndnikow*,¹⁰⁵ for example, the House of Lords relied on the second rule to assess the damages

damages, (London: Butterworths, 1973), pp. 333-335.

¹⁰⁵ *Supra.*, note 81(*The Heron II*).

caused by delayed delivery. Although this case concerned to contract of carriage, there seems no real reason why the same rule should not apply in a contract of sale.¹⁰⁶

Damages for breach of warranty of quality

Under section 53(3) of the Act 1979, where the breach related to the quality of the goods delivered, the damages which the buyer may recover is prima facie the difference between the value of the goods at the time of delivery and the value they would have had if they had conformed to the contract.¹⁰⁷ In contrast with the cases of delayed delivery, the damages recoverable under this section for the defects in the quality are the same for both goods bought for use and goods bought for resale. In practice, however, the damages for defective goods purchased for use may be calculated in a different manner. For example, it is likely that the buyer will be awarded as damages the cost of repairs or modifications of the goods which he has sustained in order to bring them up to the requisite standard. This was the case, for example, in *Keely v Guy McDonald*,¹⁰⁸ where the seller sold and delivered a Rolls-Royce which was found unmerchantable. The court held that the seller was liable for the cost of repair of the Rolls-Royce.

The main difference between the UCC and English law concerning the issue of assessing the damages in the case of seller's breach is that the UCC provides a set of unified remedial rules which irrespective of the type of the breach may be invoked to assess the damages suffered by the aggrieved buyer, whereas, like the civilian systems, under English law, the remedial provisions applicable for assessing of damages may, depending on the type of the breach, differ in each case.

Consequential damages

As in the case of non-delivery, the buyer may in certain circumstances apply for consequential damages resulting from the breach of warranty of quality. As an

¹⁰⁶ See, Mc Gregor on *Damages*, (15th ed., 1988) p. 771

¹⁰⁷ *Jackson v. Chrysler Acceptances Ltd* [1978] RTR 474, 481.

¹⁰⁸ (1984) 134 N LJ 522.

example, in *Godley v. Perry*,¹⁰⁹ a child was blinded as a consequence of using a defective catapult sold and delivered by the seller. Applying the second rule in *Hadley v. Baxendale*,¹¹⁰ the court held that the seller was liable for the damages which the defect caused to the child. As pointed out above, the second rule in *Hadley v. Baxendale*, covers “special damages” arising from particular circumstances known to both parties at the time of the contract. It is argued that it is unjust to hold the seller liable for such damages without giving him the opportunity to limit his liability or to adjust the price of the goods for the extra risk.¹¹¹ However, while this argument is convincing in those cases where the breach is not attributable to the seller’s fault, it seems unjust to exclude or to limit the seller’s liability where he fraudulently breaches the contract particularly if the consequences of his breach were foreseeable to him at the time of breach though not necessarily at the time of the contract.

Specific performance

In contrast with continental systems as well as the Scottish common law where an aggrieved party is legally entitled to seek specific implement of the contractual obligation by the breaching party,¹¹² the buyer’s prime remedy for the seller’s wrongful¹¹³ neglect or refusal to deliver the goods under English and US law is to maintain an action against the seller for damages for non-delivery.¹¹⁴ In fact, specific performance is an equitable remedy developed by the Court of Chancery as an alternative to the common law remedy of damages, where the latter was considered

¹⁰⁹ [1960] 1 WLR 9; see further, *Parsons (Livestock) Ltd. v. Uttley, Ingham & Co., Ltd.* [1987] QB 791.

¹¹⁰ *Supra.*, note 80.

¹¹¹ P. D. V. Marsh, *Comparative Contract Law England, France, Germany* (1994) p.314

¹¹² See, for example, French Civil Code, Article 1143; Spanish Civil Code, Article 1124; German Civil Code, Article 241. As to the Scots law see, for example, *Retail Parks investments Ltd. v. The Royal Bank of Scotland PLC* 1996 SC 227, 244 per Lord Cullen.

¹¹³ The buyer will have no remedy against the seller for non-delivery of the goods where he has previously repudiated the contract by word or by conduct, or has failed to tender the price, if the time for payment is due, or is otherwise in breach of his obligations under the contract. This is because in these instances the seller’s refusal to deliver the goods sold is not wrongful as required by section 51(1) of the Sale of Goods Act 1979.

¹¹⁴ See Sale of Goods Act 1979, Section 51(1).

to be inadequate and unfair,¹¹⁵ and, therefore, unlike the civilian systems, it could be regarded as secondary remedy under English law, the availability of which is a matter for the discretion of the court. This requires the court to examine the merits of individual cases to ascertain whether it is appropriate to grant an order of specific performance compelling the recalcitrant seller to carry out his duty of delivering of the goods under the sale. Clearly, the vesting in the court of such a discretionary power may cause a great deal of uncertainty among the parties concerned. The danger of this uncertainty in the field of commercial law has led both the legislators and the judges to enunciate principles or guidelines to constrain the exercise of discretion and to classify those contracts where typically specific performance will or will not be awarded.

Restriction of the remedy of specific performance to the cases where the goods sold are specific or ascertained

Accordingly, the court's discretion in ordering specific performance to deliver by the seller under section 52 of the Sale of Goods Act has been restricted to the cases where the goods sold are specific or ascertained.¹¹⁶ In other words, the buyer's application to obtain specific performance directing the seller to deliver will normally be rejected if the goods sold are of a generic nature or they are to be produced by the seller after entering into the contract.¹¹⁷ Nonetheless, in the case of *Sky Petroleum Ltd. v. V.I.P. Petroleum Ltd.*,¹¹⁸ the defendant suppliers were restrained from withholding supplies of petrol on the ground that there was no prospect of the buyer being able to find an alternative source of supply in the time of the petrol crisis. The goods in that case were neither specific nor ascertained as suggested by section 52 for granting of specific performance to carry out the contract by the seller. This indicates

¹¹⁵ See generally, I. C. F. Spry, *Equitable Remedies* (2nd ed. 1980); Sharp R., "Specific Relief for Contract" in B. J. Reiter and J. Swan, *Studies in Contract law* (Toronto: Butterworths, 1980).

¹¹⁶ For the provisions of section 52(1) of the Sale of Goods Act, see Appendix II.

¹¹⁷ [1974] 1 W.L.R. 576.A

¹¹⁸ [1974] 1 All ER 954.

that section 52 is not an exhaustive statement of when specific performance of contracts to deliver goods will be granted.

Inadequacy of the damages and the issue of hardship which equitable remedy may cause to the breaching seller

According to traditional doctrine, the plaintiff buyer must show that damages would be an “inadequate” remedy before he can obtain a decree of specific performance compelling the seller to deliver the article sold.¹¹⁹ Such is the case where the buyer can obtain no satisfactory equivalent article in the market; what was purchased is “unique”. Specific performance may well be an appropriate remedy where it is difficult to assess the exact value of the loss sustained by the buyer as a consequence of the seller’s failure to deliver the article sold and award of damages for non-delivery by the court would create the risk of under compensation or where the defendant-seller would not be able to pay damages caused by non-delivery.¹²⁰ It seems, however, that unlike the situation in the law of the United States,¹²¹ damages under English law are not considered to be inadequate so as to justify the court to order specific performance of the contract by the seller where they are hard to assess because the loss will occur in the distant future, for example, in the event of repudiation of a long term instalment contract to supply goods by the seller.¹²² Similarly, English courts would reject the buyer’s application to obtain the remedy of specific performance where the goods can be obtained elsewhere, even though they are unusual¹²³ or are available only after a considerable delay because they have to be made to order.¹²⁴

¹¹⁹ See Cooke & Oughton, *The Common Law of Obligations* (2nd ed. 1993), at p. 218.

¹²⁰ *Decro-Wall International S.A. v. Practitioners in Marketing Ltd.* [1971] 1 W.L.R. 361, 371-372; *Evans, Marshall and Co. Ltd. v. Bertola S. A.* [1973] 1 W.L.R. 349, 379-380.

¹²¹ See Treitel, G. M., “Specific Performance in the Sale of Goods” [1966] *Journal of Business Law* 211, 224.

¹²² *Fothergill v. Rowland* (1873) 17 Eq 132 CA.

¹²³ *Cohen v. Roche* [1927] 1 K.B. 169.

¹²⁴ *Société des Industries Metallurgiques S.A. v. Bronx Engineering Co. Ltd.* [1975] 1 Lloyd’s Rep. 465.

Another set of principles reflects traditional equitable remedy concern with justice and fairness. Under these principles, no order of specific performance will be granted if it would cause severe hardship to the seller (e.g., where the cost of delivery by the seller is out of the proportion to the benefit accruing to him under the contract of sale).¹²⁵

As can be seen, unlike the continental and the Iranian systems, specific performance under English law is an equitable remedy granted at the discretion of the court which could be available only in very limited circumstances. In practice, English courts have always preferred to enforce contracts negatively or indirectly, i.e., by awards of damages for breach and, therefore it is very difficult to convince them to grant specific performance requiring the seller to carry out properly the contract he has repudiated. In contrast with the English system, US courts take a somewhat more relaxed view of this remedy, more in keeping with continental practice. They are empowered by sections 2-709 and 2-716 of the UCC to order specific performance wherever commercial needs make it equitable to do so. But even under the latter system specific performance is regarded as extraordinary: it is discretionary and is made available only where the courts decide that it is fit to do so—the buyer has no ‘right’ to specific performance.

The English law approach in refusing to grant specific performance compelling the breaching seller to carry out his duty to deliver the goods under the contract seems hardly justifiable and may tip the balance of interests between the parties in favour of the seller. In fact, the buyer’s alternative remedy in such instances is to sue the seller for the damages caused by the breach, while, “the rules on damages sometimes actually encourage breach”.¹²⁶ This is because, as pointed out earlier, the provisions concerning damages under this system do not go far enough to compensate properly the buyer against all the losses which have been caused by the seller’s breach of the duty to deliver the goods sold.¹²⁷ And the seller who realises

¹²⁵ See generally, *Tito v. Waddel* [1977] Ch. 106; *Denne v. Light* (1857) 8 De G.M. & G. 774. One may draw the same conclusion under the civilian tradition of good faith which is to be observed by the parties concerned in performance of their contract.

¹²⁶ H. Beale, *Remedies for Breach of Contract* (1st ed. 1980) p. 158.

¹²⁷ See pp. 25-29, 31, ante.

that he is not liable to reimburse the buyer for all the damages caused by the breach, and that he can resell the goods in a higher price or use them in a more sufficient and profitable way, may prefer to breach the contract with the buyer.

Chapter 2

Introduction

This chapter deals with the issue of delivery of goods under the US Uniform Commercial Code (UCC). It is important to point it out that the provisions of the UCC concerning the issue of delivery are substantially based on the former US Sales Law Act 1903 which was derived from the UK Sale of Goods Act 1893. Accordingly, there are a lot of similarities between the provisions of the UK and the US legal systems with regard to the seller's duty to deliver the goods sold. However, because of the differences between the UK Sale of Goods Act and the US Sales Law Act and the alterations made by the drafters of the UCC in the provisions of the Sales Law Act, it is necessary to examine the provisions of the UCC in order to find out whether and if so to what extent the drafters of the UCC succeed in eliminating the problems arising from the provisions of the Sale of Goods Act 1979.

The Duty to Deliver under the Uniform Commercial Code (UCC)

As in the other systems under consideration the seller under the UCC is bound to tender the delivery of the goods sold to the buyer in conformity with the contract between the parties concerned. Delivery is considered as a voluntary transfer of possession and may be defined as an act by which the seller parts with possession and the buyer acquires it; delivery occurs whenever the seller does everything necessary to put the goods completely and unconditionally at the buyer's disposal.¹ In accordance with US law, tender of delivery requires that the seller put and hold

¹ *Crowder v. Aurora Co-op. Elevator Co.*, 393 N.W.2d 250, 223 Neb. 704 (1986).

conforming goods at the buyer's disposition and give the latter any notification reasonably necessary to enable him to take delivery.²

Methods of delivery

The acts and facts, which constitute delivery, vary in different classes of case and depend upon the character, quantity, and condition of the property as well as the particular case.³ The parties may agree on the manner of delivery in their contract of sale. The various categories of manner of delivery are generally the same in every legal system. Accordingly, as in the example of English law, the seller, depending on the surrounding circumstances of each case and the terms of the contract between the parties, may fulfil the duty of tendering delivery by either actual delivery or by constructive delivery of the goods sold.⁴

The most obvious way of performing delivery under the contract is for the actual goods to be physically transferred to the buyer. In the case of a sale involving the shipment of the goods, tender of delivery occurs at the time when the goods are delivered to the carrier. In such instances, the carrier is regarded as the agent of the buyer who is authorised to take the goods on behalf of the latter.⁵ This rule, nonetheless, does not apply where the seller is to carry the goods himself or where the carrier is his agent. Likewise, where the contract requires the seller to deliver at a particular destination, he is not discharged from the obligation to deliver before he has delivered the goods to the named destination and given the buyer any notification or instructions necessary to enable him to take delivery. As an example, where

² *Huskinson v. Vanderhaiden*, 251 N.W.2d 144, 197 Neb. 739 (1977).

³ *Chemlease Worldwide Inc. v. Brace, Inc.*, 338 N.W.2d 428, 37 UCC Rep. Serv. (Callaghan) 647 (Minn 1983).

⁴ *Lakeview Gardens, Inc. v. State, Ex re. Schneider*, 557 P.2d 1286, 221 Kan. 211 (Kan. 1976). Nonetheless, it is to be noted that the provisions of section 2-503 of the UCC with respect to the tendering of delivery are more detailed and clearer in comparison with those of English law under the Sale of Goods Act 1979.

⁵ *In re Nevins Ammunition, Inc.*, 79 B.R. 11 (Idaho 1987).

purchase orders provided that delivery of goods would be “F.O.B. carrier, Job site ...” tender of delivery under the UCC did not occur until goods were delivered to job site.⁶ Similarly, a contract under which a carpet seller agreed to deliver carpeting to Chicago on a specified date became a “destination contract,” and therefore created a duty for the seller to give the buyer any specific instructions which would be necessary for her to take delivery at destination.⁷ It has been held that a mere written offer to perform by the seller will be sufficient for the fulfilment of the duty in the tendering of the goods as required by the UCC.⁸ In other words, tender of delivery does not require actual physical delivery and a written offer to perform has the same effect as physical delivery.⁹

Constructive delivery is effectuated when, without transfer of the goods or their symbol, the conduct of the parties is such as to be inconsistent with any supposition other than that there has been a change in the nature of the holding of the property in the goods.¹⁰ The act or state of possessing is a condition of facts under which a person can exercise power over property at his pleasure to the exclusion of all other persons,¹¹ and constructive possession is assumed to exist where one claims to hold by virtue of some title without its actual detention or custody.¹² A constructive delivery of the article sold may be substituted for an actual delivery thereof only where such constructive delivery is in pursuance of the terms stipulated by the parties

⁶ *Ontario Hydro v. Zallea Systems, Inc.*, 569 F.Supp. 1261 (D.C.Del. 1983).

⁷ *June G. Ashton Interiors v. Stark Carpet Corp.*, 96 Ill. Dec. 306, 491 N.E.2d 120, 142 Ill. App. 3d 100 (1st Dist. 1986). It is to be remembered that in accordance with the UCC parties to a contract of sale must specifically agree to the destination contract, otherwise the contract will be regarded as a shipment contract; see e.g., *Ladex Corp. v. Transportes Aeros Nacionales, S.A.*, 476 So. 2d 763 (Fla. App. 1985).

⁸ *Sand Seed Service, Inc. v. Bainbridge*, 246 N.W.2d 911, 20 UCC Rep.Serv. (Callaghan) 654 (Iowa 1976).

⁹ However, where installation is required under the contract, tender of delivery does not occur when the goods are physically brought to the site, but, rather when installation is complete.

¹⁰ *Lakeview gardens, Inc. v. State ex rel. Schneider*, 557 P.2d 1286, 221 Kan. 211 (Kan. 1976).

¹¹ *Integrity Ins. Co. v. Marine Midland Bank-Western*, 396 N. Y. S. 2d 319, 90 Misc. 2d 868, UCC Rep. Serv. (Callaghan) 391 (1977).

¹² *Ibid.*

in the contract of sale or an established custom with regard to the sale of the said article.¹³ In one cases constructive delivery has been held sufficient to comply with contractual delivery terms and thus avoid the seller's liability for breach of the contract in failing to perform the duty to deliver.¹⁴ Accordingly, the seller may be considered to have sufficiently transferred the possession to the buyer by handing over to the buyer an object of physical control over the goods. For example, the seller will be discharged from the duty to tender delivery when he delivers to the buyer the keys of the premises where the goods are stored.

In accordance with section 2-503(4)(a) of the UCC, if the goods are in the possession of a bailee, the tender of delivery, as in English law,¹⁵ takes place when the seller either tenders a negotiable document of title covering such goods or procures acknowledgement by the bailee of the buyer's right to possession of the goods. But in contrast with the latter system,¹⁶ under section 2-503(4)(b) the seller is also considered to have complied with the provisions of section 2-503(1) of the UCC in tendering the goods to the buyer by handing over to the latter a non-negotiable document of title or a written direction to the bailee to deliver unless the buyer seasonably objects. Receipt of notification of the buyer's rights over the goods by the bailee in such instances fixes those rights as against the bailee and all third persons. It is to be noted that, unlike other methods of delivery, tender of the goods by this method does not cause risk of loss of goods to pass to the buyer. In addition the seller is also responsible for loss of any failure by the bailee to honour the non-negotiable document of title or to obey the direction until the buyer has had reasonable time to present the document or direction. A refusal by the bailee in such instances, to honour the document or to obey the seller's direction to deliver the goods to the buyer would defeat the tender of the goods by the seller. However, where the buyer is also the bailee who has physical possession of the goods when the contract is executed, delivery of a negotiable document of title as a form of tender is

¹³ *H.O. Anderson, Inc. v. Rose*, 352 S.E.2d 541, 177 W. Va. 419 (1986).

¹⁴ *Mc Greal v. Jakie Fine Arts, Inc.*, 654 P.2d 149 (Wyo. 1982)

¹⁵ See pp. 10-11, ante.

¹⁶ *Ibid.*

unnecessary, in the absence of an express agreement to the contrary by the parties concerned.¹⁷

There may be a completed delivery where the goods remain in the possession of the seller, as the agent of the buyer, or where they so remain for storage or care at the buyer's request, and nothing further remains to be done by either of the parties to complete the sale.¹⁸ In other words, in such a case the delivery takes place as soon as the seller attorns by acknowledging that he holds the goods as the buyer's bailee. It would seem that to effect constructive delivery, the attornment must relate to an identified article. An attornment in respect of an unidentified part of a bulk gives rise merely to a personal obligation on the part of the bailee, but it does not confer the buyer a direct possessory interest over the goods.

In the case of contracts involving documents, the seller can "put and hold conforming goods at the buyer's disposition" under section 2-503(1) by tendering documents which grant the buyer complete control of the goods under the provisions of Article 7 on due negotiation provided the documents so tendered are in the correct form.¹⁹ In accordance with section 2-503(5)(b) of the UCC, where the seller under the contract is required to deliver documents, unless otherwise agreed by the parties concerned, tender through customary banking channels is sufficient and dishonour of a draft accompanying the documents by the buyer constitutes non-acceptance or rejection of the goods delivered. It is to be remembered that in accordance with paragraph (a) of section 2-503(1) the seller must tender delivery at a reasonable hour and he must keep the goods so tendered for a period of time reasonably necessary to enable the buyer to take their possession.

Place of delivery

¹⁷ *North Dakota Public Service Com'n v. Valley Farmers Bean Ass'n*, 365 N.W.2d 528, 40 UCC Rep. Serv. (Callaghan) 1847 (N.D. 1985).

¹⁸ *Lakeview Gardens, Inc. v. State ex rel. Schneider*, 557 P.2d 1286, 221 Kan. 211 (Kan. 1976).

¹⁹ See the UCC, Section 2-503(5). For the full provisions of this section, see Appendix I.

In respect of the place of delivery, the provisions of the UCC are identical to those of English law and are thus susceptible to the same criticism as those arising under the latter legal system.²⁰ Accordingly, under the UCC the parties may either expressly or by implication specify in their contract the place where the goods are to be delivered. In the latter case, the parties' intention with regard to the place of delivery is to be deduced from their stipulation in the contract of sale. For example, the use of the term "arrival port" by the parties in the case of a sale involving carriage by sea, may be construed as an indication that the agreement between them is a destination contract and thereby due tender requires physical delivery of the goods at the destination specified in the sale, whereas if a contract uses no mercantile terms or trade symbols specifying requirements for delivery, and there is no specific agreement otherwise, a contract for the transportation of the goods by the carrier will be presumed to be a shipment contract. In such circumstances, it is normally the departure station which constitutes the place of delivery.²¹

If the seller under the contract is required to make delivery at a particular discharged port, and the term "discharged port" is rationally susceptible to differing interpretations, the court would consider extrinsic evidence, including usage in the trade and the course of dealing and performance between the parties, to determine whether "discharged port" referred to the port city itself or included an offshore lighterage facility.²²

In the event of the parties' failure to agree on the place of delivery, then, as in English law, if the goods sold are identified, delivery in accordance with section 2-308(b) of the UCC takes place at the place where the goods were at the time when the parties entered into the contract. The same provision applies to a bulk of goods in possession of a bailee, unless as would be normal, the circumstances show that delivery by way of documents is intended. In such instances, however, the seller is not discharged from the responsibility vis-à-vis the buyer to deliver the goods unless

²⁰ For a discussion of the problem arising under these provisions, see pp.11-12, ante.

²¹ UCC, Section 2-320. For the provisions of this section, see Appendix I.

²² *Crescent Oil and Shipping Services, Ltd. v. Phibro Energy, Inc.*, C. A. 2 (N.Y.), 929 F.2d 49 (1991).

he also procures the acknowledgement by the bailee of the buyer's right to their possession.²³ In other instances, namely, where the goods contracted for have not been identified by the parties concerned, "the place for delivery of the goods is the seller's place of business or, if he has none, his residence".²⁴

Although the agreement as to place of delivery may be supplied by surrounding circumstances, usage of trade, course of dealing and course of performance, as well as by the express language of the parties,²⁵ a court will not interpret a contract to imply a duty on the part of the seller to deliver the goods to wherever a buyer requests, if the contract and the course of dealing negate such interpretation.²⁶

Where the duty to deliver undertaken by the seller under the contract can be performed through tendering of a document of title, then, in accordance with paragraph (c) of section 2-308 of the UCC, tender at the buyer's address is not required if "customary banking channels" call only for due notification by the banker that the document is on hand, leaving the buyer himself to see to the physical receipt of the goods.²⁷

Time of delivery

Like other legal systems, the UCC permits the parties to fix in their contract the time of delivery of the goods by the seller.²⁸ In accordance with official Comment 1 of section 2-309, an agreement as to the time of delivery between the parties "may be found in a term implied from the contractual circumstances, usage of trade or course of dealing or performance as well as in an express term" of the contract. In contrast with English law, where contractual time in a contract of sale involving carriage of

²³ See UCC, Section 2-308, Official Comment 2.

²⁴ UCC, Section 2-308(a).

²⁵ *Mechanics Nat. Bank of Worcester v. Gaucher*, 386 N.E.2d 1052, 7 Mass. App. 143, 25 UCC Rep. Serv. (Callaghan) 1313 (1979). See UCC, Section 2-308, Official Comment 4.

²⁶ *L.C. Williams Oil Co., Inc. v. Exxon Corp.*, M.D.N.C., 627 F. Supp. 864 (1985).

²⁷ See UCC, Section 2-308, Official Comment 3.

²⁸ *Banner Iron Works, Inc. v. Amax Zinc Co., Inc.*, C.A.Mo., 621 F.2d 883 (U.S. App. 1980).

goods by sea is generally considered as constituting the essence of the contract,²⁹ the time so fixed under US law is not regarded as an essential term of the contract between the parties.³⁰ More specifically, in accordance with the latter system, time is not of the essence of the sales contract unless the parties expressly so provide in the contract,³¹ or unless the circumstances clearly indicate that the parties intended to make it so.³² Accordingly, although in general a failure to comply with the terms of delivery constitutes a breach of the contract entitling the buyer to resort to the remedies available under the UCC for the breach³³, delivery within a reasonable period from the original contractual delivery date has been held to constitute substantial performance of the contract.³⁴

Where a time for delivery is fixed without being made of the essence of the contract, the parties are assumed to have contemplated that there will be reasonable compliance therewith in accordance with commercial standards within the particular industry.³⁵ Thus, where time was not stipulated to be the essence in the contract, a reasonable delay in delivery was held not to constitute breach of the contract.³⁶ This rule, as is the case in Iranian law, rightly prevents the purchaser from cancelling the transaction with the seller where the time for delivery is not so essential as to render the late delivery by the latter useless to him, as it was the intention of the parties to perform the transaction which they have validly made, but, unlike Iranian law, it does not address the issue of damage which the buyer may have suffered as a result of the delay in the delivering of the goods. Nonetheless, as in the Iranian system, an

²⁹ See p. 14, ante.

³⁰ *Texas Energy Fuels Corp. v. Pemco Supply Co., Inc.*, M.D.Pa., 640 F. Supp. 2 (1985).

³¹ *Jamestown Farmers Elevator, Inc. v. General Mills, Inc.*, 552 F.2d 1285, 21 UCC Rep. Serv. (Callaghan) 783 (8th Cir. 1977).

³² *Farmers Union Grain terminal Ass'n v. Hermanson*, C.A.N.D., 559 F.2d 1177, (8th Cir. 1977).

³³ *W.B. Dunavant & Co. v. Southmost Growers, Inc.*, Civ. App., 561 S.W.2d 578 (Tex. App. 1978).

³⁴ *Master Palletizer Systems, Inc. v. T.S. Ragsdale Co., Inc.*, 725 F. Supp. 1525 (D.Colo. 1991), affirmed 937 F.2d 616.

³⁵ *J.A. Jones Const. Co. v. Cith of Dover, Super.*, 372 A.2d 540, appeal dismissed 377 A.2d 1, 22 Rep. Serv. (Callaghan) 694 (1977).

³⁶ *Jamestown Farmers Elevator, Inc. v. General Mills, Inc.*, 552 F.2d 1285 ((8th Cir. 1977).

unreasonable delay by the seller to deliver the goods sold is considered by the UCC to be a breach entitling the buyer to invoke the remedies available to him under the UCC for breach of the contract.³⁷ As will be shown later, however, there is a major difference between these two systems in such instances: while under the former system the buyer initially has to apply to the court for enforcement of the contract by requiring the seller to deliver the goods sold,³⁸ his main remedy in accordance with the UCC is to sue the seller for damages caused by non-delivery.

Where a contract contains a clause by which the parties agree that the time of delivery of the goods not to be of the essence, a reasonable delay will be treated as allowing the buyer to extend the time for delivery for a reasonable period.³⁹ Where, however, the seller is able and willing to deliver the goods at the time fixed by the parties in the contract, the buyer may not extend the time for delivery pursuant to such a contractual extension clause.⁴⁰ On the other hand, a contract under which the time for delivery is provided to be of the essence will place the burden of shipping charges and risk of delay on the seller.⁴¹ Nevertheless, if the parties provide an approximate delivery date for delivery of the goods sold and, due to the nature of the particular industry, a certain variation between the stated delivery time and the actual delivery time is acceptable within the trade, a delivery made within the industry time frame will be regarded to be in conformity with the contractual delivery terms.⁴²

A contractual agreement requiring the seller to make delivery "as soon as possible"⁴³ has been construed as meaning as soon as can be done using his greatest

³⁷ *Farmers Union Grain Terminal Ass'n v. Hermanson*, C.A.N.D., 549 F.2d 1177 (8th Cir. 1977).

³⁸ See p. 121, post.

³⁹ *Jamestown Farmers Elevator, Inc. v. General Mills, Inc.*, 552 F.2d 1285 (8th Cir. 1977); *Jon-T Farms, Inc. v. Goodpasture, Inc.*, 554 S.W.2d 743 (Tex. Civ. App. 1976).

⁴⁰ *Farmers Union Grain Terminal Ass'n v. Hermanson*, C.A.N.D., 549 F.2d 1177 (8th Cir. 1977).

⁴¹ *T & S Brass and Bronze Works, Inc. v. Pic-Air, Inc.*, C.A.4(S.C.), 790 F.2d 1098, 1103 (4th Cir. 1986).

⁴² *Reaction Molding Technologies, Inc. v. General Elec. Co.*, 588 F. Supp. 1280 (D.C.Pa. 1984).

⁴³ The requirement to deliver the goods "as soon as possible" after the sale under Iranian law applies where there is no stipulation as to the time of delivery in the contract between the parties concerned. See p. 110, post. In contrast with Iranian law, under Article 75 of the Swiss Federal Code of Obligations the seller, in the absence of an agreement to the contrary, may deliver the goods "as soon

diligence.⁴⁴ In such instances US law generally grants the seller a reasonable time within which to make delivery,⁴⁵ provided that time is not stipulated to be of the essence under such a delivery term.⁴⁶ A provision in a contract calling for delivery of the goods “as directed” by the purchaser has been held not to be an ambiguous delivery term.⁴⁷ The court construed it to mean that a delivery will be effective where the buyer directs delivery within a reasonable time, in the light of the nature and circumstances of the contract.⁴⁸

Where the parties fail to fix the time for shipment or delivery, or any other related matter in their sale contract, both the UCC⁴⁹ and the US pre-UCC law,⁵⁰ like English law, require the seller to deliver the goods within a reasonable time after the making of the contract with the buyer. Accordingly, in *F.E. Myers Co. A Div. Of McNeil Corp. v. Pipe Maintenance Services, Inc.*,⁵¹ the buyer was held not to be entitled to damages from the manufacturer for delay in the delivery of grinder pumps where the pumps were received by the former within a reasonable time after the conclusion of the agreement. On the other hand, in *Morin Bldg. Products Co., Inc. v. Volk Const., Inc.*,⁵² it was argued that even if the scheduled shipping date was not expressly agreed upon by the parties concerned, it was a shipping date which would be applied as commercially reasonable, and thus the seller, who was advised that

as possible” after the conclusion of the contract if he wishes to do so or if the buyer demands their immediate delivery from him.

⁴⁴ *In re First Hartford Corp., Bkrtcy.* S.D.N.Y., 63 B.R.479.

⁴⁵ *In re First Hartford Corp., Bkrtcy.* S.D.N.Y., 63 B.R.479.

⁴⁶ *In re First Hartford corp., Bkrtcy.* S.D.N.Y., 63 B.R.479.

⁴⁷ *Capital Steel co., Inc. v. Foster and Creighton Co.*, 574 S.W.2d 256, 264 Ark. 683 (1978).

⁴⁸ *Ibid.*

⁴⁹ UCC, Section 2-309(1). See further, *Bob Robertson, Inc. v. Webster*, 679 S.W.2d 683 (Tex. App. 1 dist. 1984); *Luedke Engineering Co., Inc. v. Indiana Limestone Co., Inc.*, C.A.Ind., 740 F2d 598 (U.S. App. 1984); *Anderson & Nafziger v. G.T. Newcomb, Inc.*, 595 P2d 709, 100 Idaho 175 (1979).

⁵⁰ *In re Zerodec Mega Corp., Bkrtcy.Pa.*, 54 B.R. 814, 42 UCC Rep. Serv. (Callaghan) 382 (1985); *Beiriger And Sons Irr., Inc. v. Southwest Land Co., Inc.*, 705 P.2d 532 (Colo App. 1985); *Nasco, Inc., v. Dahtron Corp.*, 392 N.E.2d 1110, 30 Il. Dec. 242, 74 Ill. App.3d 302 (1979).

⁵¹ 559 F.Supp. 697 D.el. 1984)

⁵² 500 F.Supp. 82 (D.C.Mont.1980).

time was of the essence and who failed to deliver metal siding to the buyer by such a date, breached the contract for the sale of the siding, notwithstanding the fact that the seller's failure to deliver was due to problems it experienced with its subcontractors and suppliers, since the seller should have contemplated such problems at the time of forming the contract of sale with the buyer.

The requirement to deliver the goods within "a reasonable time" will also be applicable to those cases where the time for delivery is initially specified in the contract, but it becomes indefinite by the application of other provisions of the contract, or where the time for delivery under the contract is waived or modified by the parties concerned.⁵³ Furthermore, unlike Iranian law, section 2-309(2) of the UCC⁵⁴ contains provisions by which the parties are permitted to enter into a contract calling for successive performances without specifying duration. According to this section, the contract in such instances will be valid for "a reasonable time", but in the absence of a contrary agreement between the parties, either of them may terminate the contract⁵⁵ at any time, without regard as to whether a reasonable time has already expired,⁵⁶ by giving the other party reasonable notice to that effect.⁵⁷ This may give rise to a problem, particularly in an international sale, if either of the parties chooses to terminate the contract immediately after its formation, as in such instances under the UCC the other party will have no remedy for the expenses which he has sustained in the making of the transaction with the terminating party.⁵⁸

⁵³ *Farmers Union Grain Terminal Ass'n v. Hermanson*, C.A.N.D., 549 F.2d 1177 (8th Cir. 1977).

⁵⁴ For the full provisions of this section, see Appendix I.

⁵⁵ It is to be remembered that the effect of termination of the contract is to stop the contract from being operated as against the parties from the time of termination and as such must be distinguished from a party's justifiable cancellation of the contract as a separate remedy for breach of the contract by the other party. See UCC, Section 2-309, Official Comment 9. See further *Mott Equity Elevator v. Svihovec*, 236 N.W.2d 900 (N.D.1975).

⁵⁶ UCC, Section 2-309(2).

⁵⁷ UCC, Section 2-309(3).

⁵⁸ Of course, in accordance with the UCC's requirement of good faith declared in UCC, Section 1-203 which is applicable to all provisions of the UCC, the person who chooses to terminate a dealership contract must act in good faith otherwise he will be responsible as against the other party for breach of

What is a reasonable time is a question of fact which, in accordance with the guidelines set forth in the Official Comments to the UCC,⁵⁹ depends upon what constitutes acceptable commercial conduct in view of the nature of the goods to be delivered, the extent of the seller's knowledge of the buyer's intentions,⁶⁰ transportation conditions,⁶¹ and the nature of the market in respect of the goods.⁶² The nature, purpose and circumstances surrounding a transaction may be ascertained from the parties' previous course of dealing and usage of trade.⁶³ Where, for example, a contract for the purchase of plastic parts provided for delivery approximately 16 to 22 weeks after the receipt from the buyer of a deposit, and where a variation of 20% between the number of weeks quoted and the number of weeks for actual delivery was acceptable within the trade, delivery within 18 to 26 weeks after receipt of the deposit was in compliance with the delivery terms.⁶⁴

As pointed out earlier, the seller's failure to deliver or to make a proper tender of delivery within a reasonable time (in circumstances where no time is specified by the agreement) constitutes a breach of the contract for which the buyer may invoke the remedies available under the UCC.⁶⁵ The requirement of good faith may require the latter to give notice to the seller before he can avail himself of this breach.⁶⁶

Early delivery

the sale: see, *Tele-Controls, Inc. v. Ford Industries, Inc.*, 388 F.2d 48 (7th Cir. 1967). Nonetheless, the requirement of good faith does not go far enough to protect the interests of the non-terminating party in the foregoing instances.

⁵⁹ UCC, Section 2-309, Official Comment 1.

⁶⁰ *Barbarossa & Son, Inc., v. Iten Chevrolet, Inc.*, 265 N.W.2d 655, 659 (Minn. 1978).

⁶¹ *Morin Building Products Co., Inc., v. Volk Construction Inc.*, 500 F.Supp. 82 (D.C.Mont. 1980).

⁶² *Anderson & Nafziger v. G.T. Newcomb, Inc.*, 595 P.2d 709, 100 Idaho 175 (1979).

⁶³ *Jamestown Terminal Elevator, Inc. v. Hieb*, 246 N.W.2d 736 (N.D. 1976).

⁶⁴ *Reaction Molding Technologies, Inc., v. General Elec. Co.*, 588 F.Supp.1280 (D.C.Pa. 1984)

⁶⁵ For the details of these remedies, see pp. 61-79, post.

⁶⁶ See UCC, Section 2-309, Official Comment 5.

In contrast with the Iranian civil system, under which the seller is required to deliver the goods sold immediately after conclusion of the contract if no time for delivery is fixed by the parties concerned, although tender of delivery under the UCC at what is called an unreasonable early date is not a breach of contract,⁶⁷ he will be held liable for the breach of the contract if he insists upon delivery at that time and refuses to wait until the proper time for delivery. In other words, whilst in such instances the seller under the Iranian law⁶⁸ is bound to deliver the object of the sale as early as possible, the UCC holds him responsible for breach of the contract if he does so. However, there seems to be little justification for preventing the seller from delivering the goods as early as he can in those cases where there is no agreement in the contract as to the time of delivery between the parties. This is particularly so in those legal systems in which the property in the goods passes to the buyer upon the formation of the contract with the seller. In fact, in such instances it is unjust to impose on the seller the risk of loss of the property which belongs to the other party by preventing him from delivering the goods to the latter, especially when delivery of the goods causes no inconvenience to the buyer.

Quantity of the goods to be delivered

Unlike the most modern systems, the UCC does not contain any express provision to deal specifically with the question of quantity of the goods delivered by the seller. Nonetheless, section 2-106 of the UCC generally requires him to deliver goods in consistency with the contract. According to section 2-106(2) of the UCC:

“Goods or conduct including any part of a performance are ‘conforming’ or conform to the contract when they are in accordance with the obligations under the contract.”

Therefore, where the seller delivers less or more than the quantity called for by the contract, the goods are non-conforming, in which case the buyer may, in accordance

⁶⁷ See UCC, Section 2-309, Official Comment 4.

⁶⁸ See pp. 110-111, post.

with section 2-106 of the UCC, accept the whole or any commercial unit, or, units, or reject the whole or any commercial unit or units not accepted. Accordingly, whereas under other legal systems under consideration,⁶⁹ the buyer in the case of a shortfall in the quantity of the goods delivered by the seller has an option either to reject the goods so delivered or to accept all of them on payment of the right proportion of the contractual price,⁷⁰ under the UCC the buyer in such instances has a further option of accepting only part of the goods delivered while rejecting the rest of them, provided that in doing so he observes the principle of good faith. This principle may presumably preclude the buyer from considering the delivery by the seller as non-conforming to the contract for shortfall or excess in the quantity of the goods delivered where such a shortfall or excess in quantity is trivial.

The latter option in granting the buyer a discretionary power to accept only part of the goods delivered, however, seems to be unjustifiable in the foregoing cases. It may be argued that the seller's action in delivering goods which are less than the amount provided in the contract is a new offer for the sale of the goods delivered or any of their units in accordance with the price and the terms of the original contract which could be either accepted or rejected by the buyer. Under such an argument the seller would be liable for the breach of the original contract and accordingly the buyer may sue him for the damages caused by the shortfall in the quantity of the goods delivered as well as for the proportion of the goods which he rejects. But such an argument could be rejected on the ground of contradiction with the provisions of section 2-608 of the UCC. Since contrary to the general principle of contract law under which neither of the parties is allowed to revoke an offer which has been validly accepted by him, in accordance with provisions of section 2-608 if a lot has been accepted by the buyer on the reasonable assumption that its non-conformity as to the quantity will be cured, he may revoke the acceptance if the seller fails to cure the defect seasonably. Even if the said argument is accepted, it would apply only to

⁶⁹ As to the provisions of the English system concerning short delivery, for example, see pp. 18-19, ante.

⁷⁰ However, if the seller reasonably cures the defect in quantity of the goods delivered he may recover the full purchase price from the buyer.

cases where the buyer accepts all of the goods delivered to him, otherwise his action in retaining only part of the goods so delivered will be considered as a counter offer by him which needs to be accepted by the seller.

Nevertheless, the UCC's principle of good faith which is to be observed by the buyer in the performing of the contract between the parties, would seem to prevent him from misusing the discretionary power under section 2-106. Moreover, the seller in the case of rejection of the goods, or any part of them, will in certain circumstances have a right to cure his performance by the redelivering the shortfall in the quantity to the buyer even if, in contrast with English law, the time set in the contract for the delivery of the goods has expired.⁷¹ In other words, while under the English system the effect of rejection of the goods by the buyer after the time of delivery is to repudiate the contract between the parties, in accordance with the UCC his rejection will only suspend its performance by the seller.

Delivery by instalment

According to section 2-307 of the UCC:

“Unless otherwise agreed all goods called for by a contract for sale must be tendered in a single delivery and payment is due only on such tender but where the circumstances give either party the right to make or demand delivery in lots the price if it can be apportioned may be demanded for each lot.”

This section re-declares the English general rule⁷² that in the absence of any contrary agreement, a sale contract requires the seller to deliver at one time, or tender a complete delivery, as opposed to effect a delivery by instalments. However, in contrast with English law, it also expressly states that there are certain circumstances which give rise to a seller's right to perform his duty of delivery under the contract by instalments. Accordingly, the quantity of the goods to be delivered, the place at

⁷¹ See generally Eric C. Schneider, “The seller's right to cure under the Uniform Commercial Code and the United Nations Convention on contract for International Sale of Goods” (1989) 7 *Arizona Journal of International and Comparative Law* 70. As to the position under English law, see p. 19, footnote 77, ante.

⁷² See Sale of Goods Act 1979, Section 31(1). See further, pp. 19-20, ante.

which such delivery is to be made, and the buyer's facilities for receiving the goods, may be such as to make it literally impossible or commercially impracticable to make an actual delivery of all the goods at one time. Under such circumstances, the UCC authorises the seller to make, or the buyer to demand delivery in instalments even though the contract between the parties is silent on that point. The following is an example: the parties call on shipment of fifteen carloads of wheat (which are to be resold by the buyer) and only five cars are available at the time when the seller is to deliver the goods or the buyer's storage space is limited and he cannot therefore receive all the fifteen carloads at once. Delivery may be made by instalments and the buyer is not entitled to reject the goods so delivered on the basis of defect in quantity alone, provided that the circumstances do not amount to a repudiation or default by the seller concerning the expected balance, or do not give the buyer a ground for suspending to perform his duty under the contract because of insecurity under the provisions of section 2-609. The seller, however, is bound to deliver the balance of the goods within a reasonable time and in a reasonable manner according to the policy of section 2-503 on manner of tender of delivery. His failure to comply with this requirement to deliver the shortfall in quantity "seasonably"⁷³ would justify the buyer in revoking his acceptance under section 2-608, since he is considered to have accepted a lot on the reasonable assumption that non-conformity as to the quantity of the goods delivered will be cured by the seller.⁷⁴

Where the goods accepted are used or otherwise disposed of by the buyer, he may nevertheless retain the right to set off, against the seller's claim for the purchase price, those damages which he, the buyer, has sustained from the seller's failure to deliver the balance.

⁷³ "Seasonably", the term used in the UCC, means 'in time' and in correct manner.

⁷⁴ Section 2-608 of the U.C.C. states that the buyer may revoke his acceptance only if the non-conformity substantially impairs the value of the goods to him. And since in the foregoing instances the seller's failure to cure by delivering the remaining parts of the goods amounts to substantial impairment of their value, therefore the buyer is entitled to revoke acceptance with the respect of those parts of the goods which have already been delivered to him.



Excess in quantity of the goods delivered

In contrast with the other systems under examination, the options which are available to a buyer in respect of the delivery of an excess in quantity of goods, are identical to those which were mentioned above relating to a shortfall in their quantity. This means that where the quantity of the goods delivered is larger than what is provided for by the parties in the contract, the buyer under section 2-106 of the UCC may not only, as in English law, accept the goods included in the contract and reject the excess in the quantity of the goods delivered or accept all the goods and pay an additional price for the excess in quantity at the contract rate⁷⁵ to the seller. Alternatively he may reject the whole goods, but, in contrast to the provision in English law,⁷⁶ he may also retain any unit or units of the goods so delivered and reject the rest of them.

The problem with section 2-106 of the UCC is that in the case of excessive delivery it does not require the buyer to accept that quantity of the goods which is, in fact, included in the contract. Obviously it is wrong to force the buyer to accept the excess in quantity if, for any reason, he does not wish to do so, but it is equally wrong and unjust to allow the buyer to reject the whole goods and to sue the seller for breach of the contract merely because the quantity of the goods delivered is larger than what was provided for by the parties. Furthermore, the buyer's option under section 2-106 to accept the whole excess in quantity or any of its unit or units without obtaining the seller's consent in this regard seems hardly justifiable, particularly if the market price of the goods is substantially higher than the contractual price at the time of delivery and the seller has mistakenly delivered the excess in quantity to the buyer. It seems that the problems and injustice caused by section 2-106 has been partly obviated by section 2-508 which allows the seller to cure the non-conforming goods delivered. However, as it is mentioned in the following section, the seller's

⁷⁵ See the UCC, Section 2-607(1), which requires the buyer to pay at the contract rate for any goods accepted.

⁷⁶ For the provisions of English law and their associated criticism, see pp. 20-22, ante.

right to cure under the UCC is limited to those instances where the buyer rejects the goods.

The seller's right to cure the non-conformity of the goods delivered

As pointed out earlier, pursuant to the UCC, the seller may in certain circumstances cure the defects in the goods delivered to the buyer. This is a novel legal doctrine which has no antecedent in either the US pre-UCC or English law.⁷⁷ The UCC's provision allowing the seller to cure any non-conformities in the goods delivered is a significant step in the direction of maintaining the contract entered into by the parties concerned, since performance of the contract of sale is their main purpose in dealing with each other and this doctrine provides a good opportunity towards preventing the buyer from cancelling the binding contract for a non-conformity which can be properly cured by the seller. Nonetheless, the UCC provisions which allow the seller to cure non-conformities in the goods delivered suffer from certain defects which, in the final analysis, tip the balance of interests between the parties in favour of the sellers.

According to section 2-508(1) of the UCC, the seller has the right after delivery of the goods to cure any non-conformity in documents of sale or performance prior to the date set for delivery in the contract of sale if he reasonably notifies the buyer of his intention to cure.⁷⁸ In other words, this section provides the seller with the discretionary option of either curing the defects in his delivery of the goods by reasonably notifying the buyer that he intends to cure, or of giving compensation to the buyer for the damage caused to the latter by his breach. The option to cure the non-conformity of the goods delivered in such instances is available to the seller even if it causes the buyer unreasonable inconvenience or unreasonable expense. While the seller's option to cure is commendable in the sense that it leads to enforcement of

⁷⁷ For the position under English law, See p. 19, footnote 77, ante.

⁷⁸ UCC, Section 2-508(1).

contract, it is unjust to permit him to exercise this option where it causes the buyer unreasonable inconvenience or unreasonable expense.⁷⁹

The UCC does not state whether the seller may re-avail himself of the provisions of section 2-508(1) by re-curing of non-conformities in the goods “within the contract time” where his original effort to cure them has failed. Nonetheless, there seems to be no reason why the seller should not, as in English law,⁸⁰ be able in such instances to cure the defects in delivery under the foregoing section within the time set for performance of the contract, particularly if it does not cause the buyer to suffer unreasonable expense or unreasonable inconvenience.

Moreover, the UCC does not address the issue of whether the seller may invoke the provisions of section 2-508(1) to cure non-conformities in the goods delivered where they are rejected by the buyer through revocation of his acceptance under section 2-608. It has been generally held by the courts that the seller’s right to cure “within the contract time”, under section 2-508, limits the buyer’s right to reject under section 2-602, but not the buyer’s right to revoke acceptance pursuant to section 2-608. This means that the seller under the UCC has no right to cure non-conformities in the goods delivered where the buyer accepts the goods despite these non-conformities.⁸¹ Nevertheless, it is possible for a court to preserve the seller’s right to cure by deciding, for example, that the buyer did not have a reasonable opportunity to inspect the goods delivered and, consequently, no acceptance has

⁷⁹ It appears that United States’ courts have tended to favour the seller as against the buyer in setting the time during which this unfettered right to cure exists. In *Traynor v. Walters*, 342 F.Supp. 455, 10 UCC Rep. Serv. (Callaghan) 965 (M.D. Pa. 1972), for example, the court extended the contracted for performance date six days (from December 8 to December 14) for delivery of Christmas trees. The court argued that the buyer’s statement that his customers did not need the trees until December 16th and the buyer’s demand for other trees on December 14th modified the agreement between the parties.

⁸⁰ See p.19, footnote 77, ante.

⁸¹ See, e.g., *Boies v. Norton*, 526 S.W.2d 651, 17 UCC 1214 (Tex.Civ.App.1975), (the seller held to have no right to cure where the buyer sued him for damages, not ‘rescission’); *Bonebrake v. Cox*, 499 F.2d 951, 14 UCC 1318 (1974) (the court argued that since the buyer accepted defective goods, therefore, the seller has no right to cure).

taken place. Moreover, in accordance with the text of section 2-608(1)(a) itself, where the buyer accepts the goods on the reasonable assumption that their non-conformity would be cured, he cannot revoke acceptance before offering the seller a reasonable period to cure.

Obviously, these exceptions to the courts' dicta upon which the seller is precluded from curing non-conformities will merely cause uncertainty among parties to a contract of sale. This uncertainty could appropriately be obviated by allowing the seller to cure the defects in his delivery after acceptance of the goods by the buyer if the time for performance of the contract has not expired and it does not cause any unreasonable harm to the latter.

The seller's proper exercise of the right to cure will cause the buyer to lose his right to reject. Nevertheless the latter will retain his right under section 2-714 to recover any damage which he has suffered as a consequence of the original non-conforming tender.

Where the time set by the parties for performance of the contract has passed, the seller, following section 2-508(2) of the UCC, may cure the defects in delivery of the goods which have been rejected by the buyer only if at the time of delivery he had reasonable grounds to believe that non-conforming tender would be acceptable, with or without a money allowance.⁸² This is provided that he seasonably notifies the buyer of his intention to cure and that he cures with a substitute conforming tender within a "further reasonable time."⁸³

When the seller is considered to have "reasonable grounds to believe" that a tender would have been acceptable is a matter of dispute among commentators on the UCC. Professor Nordstrom states that the language of section 2-508(2) allows the seller to cure only if he actually knew of the non-conformity of tender at the time of performance.⁸⁴ According to his view, if, because of a prior course of dealing or trade

⁸² For the cases where such reasonable grounds lie, see UCC, Section 2-508, Official Comment 2.

⁸³ UCC., Section 2-508(2) .

⁸⁴ R. Nordstrom, *Handbook of the Law of Sales* (1970), para. 105, at pp 319-321. See also *Meads v. Davis*, 22 N.C. App.479, 481, 206 S.E.2d 868, 869 (1974) in which this approach was applied by the court.

usage, the seller reasonably believed the non-conforming tender would be acceptable to the buyer, he may cure the non-conformities within a reasonable time after expiry of the time for performance if the latter unexpectedly rejects the goods tendered.⁸⁵ In *T.W. Oil, Inc. v. Consolidated Edison Co*,⁸⁶ the seller was held to be entitled to cure when he shipped oil with a 0.92% sulphur content. The court found that the seller had a right to cure, as he knew that the buyer could use oil with a sulphur content of up to 1%.⁸⁷ Citing “decision history” and the “mainstream of scholarly commentary,” the court rejected Professor Nordstrom’s idea that a seller must have knowledge of the defect at the time of performance to be able to cure.⁸⁸ Under this approach, nevertheless, if a middleman seller re-dispatches goods without inspecting them and they turn out to be non-conforming, he should not be allowed to cure under a literal reading of section 2-508(2) of the UCC. However, it seems illogical to allow the seller to cure the defect in delivery, even where he knows the non-conformities, if it causes unreasonable inconvenience or unreasonable expenses to the buyer, or if the time of delivery is essential to him. Suppose that the buyer purchases 200 cars from the BMW company to be delivered on 25th of April 1997 in order to fulfil his obligations towards the sub-purchasers by delivering of the goods to them on 30th of April 1997. Now if the original seller delivers only part of the cars sold at the time specified in the contract, it would be unreasonable to allow him to cure non-conformity by delivering the rest of the cars at a date after 30th of April 1997 if the sub-purchasers reject the cars delivered to them on the basis of strict contractual terms between them and the original buyer. Moreover, allowing the seller to cure non-conformities in the goods delivered would encourage him to deliver non-conforming goods in the hope that despite their non-conformities they will be accepted without any objection by the buyer. In other words, under this approach the seller would make no effort to cure non-conformities even though he knows of them before the date of delivery.

⁸⁵ R. Nordstrom, *supra.*, note 85, para. 105, at p. 321.

⁸⁶ 57 N.Y.2d 574, 443 N.E.2d 932, 457 N.Y.S.2d 458, 35 UCC Rep. Serv. (Callaghan) 12 (1982).

⁸⁷ *Ibid.*

⁸⁸ *Ibid.* At 57, 443 N.E.2d at 939, 457 N.Y.S.2d at 585, 35 UCC Rep. Serv. (Callaghan) at 20.

Other commentators, arguing that the foregoing approach would severely limit the right of the seller to cure, suggest a test under which he would be able to cure if, had he known of the defect, he would have reasonably believed that the buyer would accept the goods.⁸⁹ Nonetheless, the language of the UCC and its Official Comments does not support this latter approach.⁹⁰ Moreover, this approach not only discourages the seller (as in the previous approach) to take any steps towards the curing of non-conformities which are known to him, but it may even foster him not to inspect the goods before their delivery to the buyer.

A third approach, suggested by Professors White and Summers and followed by some courts,⁹¹ concludes:

- [A] seller should be found to have had reasonable cause to believe that his tender would have been acceptable any time he can convince the court that:
- (1) he was ignorant of the defect despite his good faith and prudent business behaviour; or
 - (2) he had some reason such as prior course of dealing or trade usage which reasonably led him to believe that the goods would be acceptable.

The problem, however, with this approach is that it does not take into account the extent of the hardship and inconvenience which the buyer may have to suffer as a consequence of unreasonable delay or unreasonable expenses caused by the seller's right to cure.

A final approach, argued for by Professor Wallach, is that courts do not pay attention to the knowledge that the seller has about the non-conformities, but rather to the severity of the breach.⁹² In *Bartus v. Riccardi*,⁹³ the court argued that the seller

⁸⁹ Ayschmitt & Frisch, "The Perfect Tender Rule-An 'acceptable' Interpretation" (1982) 13 *University of Toledo Law Review* 1375 at pp. 1392-95.

⁹⁰ G. M. Travelio, "The U.C.C.'s Three 'R's: Rejection, revocation and (the seller's) Right to Cure" (1984) 53 *University of Cincinnati Law Review*, 931 at pp. 945-946.

⁹¹ See, e.g., *Wilson v. Scampoli*, 228 A.2d 848, 849 (D.C.1967) (seller had a right to cure a defective television set because "a retail dealer would certainly expect and have reasonable ground to believe that merchandise like colour television sets, new and delivered as crated at the factory, would be acceptable as delivered.").

⁹² Wallach, "The Buyer's right to Return Unsatisfactory Goods- The Uniform Commercial Code Remedies of Rejection and Revocation of Acceptance" (1981) 20 *Washburn Law Journal* 20; See also

of a hearing aid who delivered a newer model hearing aid than was described in the contract had reasonable grounds to believe that it would be acceptable to the buyer, since the model delivered was the improved version of the model ordered by the buyer and that the seller therefore had a right to cure under subsection 2-508(2).⁹⁴ Similarly, the court in *Appleton State Bank v. Lee*,⁹⁵ allowed the seller to cure the defective delivery even though he had no knowledge at the time of delivery of the non-conformity. In this case the seller mistakenly delivered a sewing machine of the wrong brand but which was otherwise identical to the one ordered. The court argued that the buyer received what he had bargained for, a \$200 sewing machine.⁹⁶

According to this view if tender of delivery does not meet the buyer's expectations under the contract, the seller will not be allowed to cure the performance. As an example, in *McKenzie v. Alla-Ohio Coals, Inc.*,⁹⁷ the seller sent coal with an ash content of 13.5 to 16% under a contract that specified that the ash content was not to exceed 7.5%. The court stated that no seller could have reasonably believed that such coal was suitable to the buyer's use as metallurgical coal and consequently, held that the seller had no right to cure.⁹⁸ As can be seen the emphasis in such cases is rightly less on the seller's knowledge of the defect or reasonable belief in the acceptability of the non-conforming tender than on the basis of the parties' agreement. Nevertheless, advocates of this approach have not adequately considered the issue of extent of inconvenience which the seller's right to cure non-conformities in delivery may cause to the buyer. This problem could be solved by arguing that the parties at the time of formation of contract have impliedly agreed that the seller cannot cure non-conformities in delivery where it causes the buyer

Note, "Nebraska Uniform Commercial Code, The Seller's Right to Cure" (1982) 16 *Creighton Law Review* 155.

⁹³ 55 Misc. 2d 3, 284 N.Y.S.2d 222, 4 UCC Rep. Serv. (Callaghan) 845 (1967).

⁹⁴ *Ibid.*, at 6-7, 248 N.Y.S.2d at 225, 4 UCC Rep. Serv. (Callaghan) at 848.

⁹⁵ 33 Wis. 2d 690, 148 N.W.2d 1(1967).

⁹⁶ *Ibid.*, at 694, 148 N.W.2d at 3.

⁹⁷ 29 UCC Rep. Serv. (Callaghan) 852 (D.C. Colo 1979).

⁹⁸ *Ibid.*, at 858.

unreasonable inconvenience or unreasonable expenses. In other words, the parties do not reasonably expect the seller to be entitled to cure non-conformities in delivery where it causes the buyer to suffer unreasonably, while on the other hand the former would be allowed to cure even though the delivery is substantially non-conforming if it does not unreasonably harm the buyer.

Section 2-508(2) of the UCC requires the seller to give seasonable notice to the buyer of his intention to cure and then cure within a reasonable time. The requirement of “seasonable notice” favours the parties’ expectations under the contract rather than the seller’s reasonable belief that the goods will be accepted. In *National Fleet Supply, Inc. v. Fairchild*,⁹⁹ the buyer ordered an engine model 270 and received a model 250 which could not be used in the buyer’s truck. It was held that the seller’s offer to cure with a credit memorandum more than two months after the sale was not reasonable notice.¹⁰⁰

In *Bevel-Fold, Inc. v. Bose Corp.*,¹⁰¹ the seller went out of business after delivering stereo speaker cabinets which were “substantially non-conforming.” The court held that the buyer was not bound to wait for the seller’s notice of cure before having a right to return the cabinets.¹⁰² The court argued that “it would be contrary to the UCC’s rule of reasonableness to require the buyer to use or retain substantially non-conforming goods which are incapable of adequate repair.”¹⁰³ In *Marine Mart, Inc. v. Pearce*,¹⁰⁴ the seller tendered a motorboat which needed major repairs. The Arkansas court stated that the “further reasonable time” given to the seller to cure is

⁹⁹ 450 N.E.2d 1015, 36 UCC Rep. Serv. (Callaghan) 480 (Ind. Ct. App. 1983).

¹⁰⁰ *Ibid.*, at p. 1018, 36 UCC Rep. Serv. (Callaghan) at 486.

¹⁰¹ 9 Mass. App. Ct. 576, 402 N.E.2d 1104, 28 UCC Rep. Serv. (Callaghan) 1333 (1980).

¹⁰² *Ibid.*; see also *Davis v. Colonial Mobile homes*, 28 N.C. App. 13., 220 S.E.2d. 802, 18 UCC Rep. Serv. (Callaghan) 662 (1975), cert. Denied, 289 N.C. 613, 223 S.E.2d 391 (seller of mobile home told the buyer he did not know how long it would take to cure. After three months the buyer moved out and the court held that the seller no longer had a right to cure.)

¹⁰³ *Bevel-Fold, Inc. v. Bose Corp.*, 9 Mass. App. Ct. 576, 584, 402 N.E.2d 1104, 1108, 28 UCC Rep. Serv. (Callaghan) 1333, 1339 (1980).

¹⁰⁴ 252 Ark. 601, 480 S.W.2d at 133, 10 UCC Rep. Serv. (Callaghan) 1047 (1972).

intended to benefit the buyer and an offer to make only minor repairs during a five months period from the time the contract was not a seasonable notice of cure.¹⁰⁵

By analogy, the buyer would presumably have no obligation to wait for seasonable cure if the goods delivered are substantially less than the amount fixed by the parties in the contract and the buyer has a reason to believe that the seller would not be able to cure non-conformities within a reasonable time by delivery of the shortfall in the quantity or that the time for performance is so essential to the buyer as he cannot wait for the seller's notice expressing his intention to cure the non-conformities.

Where defects in the goods tendered are minor or the shortfall in their quality is trivial but the delay in cure is clearly unreasonable, the time extended to the seller to cure is limited to the reasonable expectations of the buyer. In *Ramirez v. Autosport*,¹⁰⁶ the buyer of a camper van was told by the seller's agent that the vehicle was not ready on the date set in the contract because of minor defects. The buyer called the seller several times but was given excuses until, two weeks after the contract performance date, the vehicle was said to be ready. In fact, the seller was still working on the minor defects and the buyer had to wait another two weeks while the seller continued to stall. The court rejected a holding that minor defects do not justify rejection by the buyer¹⁰⁷ and a holding that the right to cure is limited to trivial defects.¹⁰⁸ The court stressed the circumstances surrounding the transaction and the inconvenience to the buyer rather than the materiality of the original breach.¹⁰⁹

¹⁰⁵ *Ibid.*, at 607, 480 S.W.2d at 137, 10 UCC Rep. Serv. (Callaghan) at pp. 1052-53; see also *Jenson v. Seigel Mobile Home Group*, 105 Idaho 189, 668 P.2d 65, 35 UCC Rep. Serv. (Callaghan) 804 (1983) (seller has right to cure problems with unliveable mobile home only until the buyer finds the seller's efforts unsatisfactory and revokes acceptance). *Conte v. Dwan Lincoln-Mercury, Inc.*, 172 Conn. 112, 374 A.2d 144, 20 UCC Rep. Serv. (Callaghan) 899 (1976) (seller's right to cure defective automobile does not last for an indefinite time).

¹⁰⁶ 88 N.J. 277, 440 A.2d 1345, 33 UCC Rep. Serv. (Callaghan) 134 (1982).

¹⁰⁷ *Gindy Mfg Corp. v. Cardinale Trucking Corp.*, 111 N.J. Super. 383, 286 A.2d 345, 7 UCC Rep. Serv. (Callaghan) 1257 (1970).

¹⁰⁸ *Pavesi v. Ford Motor Co.*, 155 N.J. Super. 373, 382 A.2d 954, 23 UCC Rep. Serv. (Callaghan) 929 (1978)(seller had no right to cure paint defects in a car which substantially impaired the car's value).

In summary, the right to cure non-conformities of the tendered goods by sellers is clearly a significant step towards a right path in the enforcing of a contract which has been validly formed by the parties. This, like Iranian law, prevents the buyer from misusing his right by sudden rejection of the goods delivered where the seller can properly cure non-conformities in them. However, unlike the latter system, the right to cure under the UCC may in itself be misused by the seller as against the buyer where it causes the latter to sustain unreasonable expenses or unreasonable inconvenience.

The Buyer's Remedies for Breach of the Contract by the Seller

Like the other legal systems, the UCC regards the seller as being in breach of the contract where he fails to deliver or where he delivers goods which are inconsistent with the contractual terms concerning their quality, quantity or the time of delivery. In the event of breach of the contract by the seller, the UCC confers a variety of remedies upon the aggrieved buyer which, depending on the circumstances surrounding each case, can be invoked by him. Accordingly, where the goods delivered are not in conformity with the contract, the buyer may reject or revoke his acceptance if the seller fails to cure the non-conformity. The buyer's rightful rejection or his justifiable revocation of acceptance entitles him to resort to the remedies identified in section 2-711. The buyer may avail himself of the same remedies where the seller fails to make delivery or repudiates the contract. In accordance with section 2-711, the buyer, after recovering of the purchase price or part of it paid to the seller, may cover (2-712) or obtain damages for non-delivery (2-713). In addition, section 2-711(2) allows the buyer in certain cases to recover the goods identified in the contract (2-502) or to secure specific performance or replevin (2-716).

¹⁰⁹ *Ramirez v. Autosport*, 88 N.J. 277, 440 A.2d 1345, 33 UCC Rep. Serv. (Callaghan) 134 (1982); Cf. *Erling v. Homera, Inc.*, 298 N.W.2d 478, 30 UCC Rep. Serv. (Callaghan) 181 (N.D.1980) (one and half years was too long for buyer of mobile home to wait for cure of water condensation problem).

The buyer's right to reject or revoke acceptance of non-conforming goods

The buyer's rights of rejection and revocation of acceptance are considered "goods oriented" remedies which have been defined by section 2-601 and the sections following.¹¹⁰ They are self-help remedies which permit the buyer to return non-conforming goods to the seller. This would relieve the buyer from the obligation to pay the contractual price, and entitle him to recover that part of the price he has already paid.¹¹¹ It is to be noted that, like English law, there is a significant economic difference between the status of the buyer who rejects and the status of the buyer who accepts and then sues the seller for breach of obligation to deliver goods in conformity with the contractual terms. This is because the buyer who accepts non-conforming goods and sues for breach of warranty under section 2-714 may recover only for injury which is proximately resulted from the non-conformities in the goods. By contrast, where the buyer rejects the entire goods he may claim compensation for the loss resulting from the seller's failure to perform his end of the contract by a suit under sections 2-712 or 2-713. He may further escape the bad bargain and throw any loss resulting from depreciation of the goods back upon the seller. There are, however, instances in which the courts have awarded sellers a sum for the value the buyers derived from their use before rejection or revocation.¹¹²

Section 2-601 confers the right to reject as follows:

“### 2-601. Buyer's Rights on Improper Delivery

Subject to the provisions of this Article on breach in instalment contracts (section 2-612) and unless otherwise agreed under the sections on contractual limitations of remedy (sections 2-718 and 2-719), if the goods or tender of delivery fail in any respect to conform to the contract, the buyer may
(a) reject the whole; or

¹¹⁰ James J. White & Robert S. Summers, *Uniform Commercial Code* (4th ed. 1995), vol. 1, p. 426.

¹¹¹ See UCC, Section 2-711(1)

¹¹² See e.g., *American Container Corp.*, 111 N.J. Super. 322, 268 A.2d 313, 7 UCC 1301 (1970); *Orange Motors of Coral Gables, Inc. v. Dade County Diaries, Inc.*, 28 So.2d 319, 10 UCC 325 (Fla. App. 1972); *Earling v. Homera, Inc.*, 298 N.W.2d 478, 30 UCC 181 (N.D. 1980). As to the effect of cancellation of the contract by the buyer under Iranian law, see p. 115, post.

- (b) accept the whole; or
- (c) accept any commercial unit or units and reject the rest.”

From sections 2-601, 2-602, 2-508 and 2-612, one can distil at least the following general substantive requirements for the right to reject: (1) absence of acceptance, (2) goods that do not conform or a tender of delivery that does not conform, (3) absence of an effective and rightful cure by the seller under section 2-508 and (4) absence of a contract term prohibiting rejection. The absence of bad faith under section 1-203 is a further substantive requirement which restricts the buyer’s right to reject.

Where the goods or the tender depart in any important way from the contract, the buyer may reject if the seller fails to exercise a right to cure under section 2-508 and if the buyer satisfies the procedural requirements of an effective rejection. The buyer who chooses to reject non-conforming goods is required by section 2-602 of the UCC to do so “within a reasonable time” after delivery or tender of the goods. This requirement is in many respect similar with English law, under which the seller is bound to exercise the option to reject the goods within a fairly short period. In contrast to English law, the UCC additionally requires that the buyer “seasonably” notify the seller of rejection (section 2-602) and to state a particular nonconformity which is ascertainable by reasonable inspection and for which the goods have been rejected (section 2-605). The reason for this is that the seller should have an opportunity to cure. Notification would also permit the seller to assist the buyer in minimising the buyer’s losses, and to return the goods to the seller early before they have substantially depreciated. There are, however, major differences between English law and US law concerning the buyer’s right to reject. Following section 15A of the Sale of Goods Act 1979 (as amended), the buyer who does not deal as a consumer cannot reject if “the breach is so slight that it would be unreasonable for him to do so”, whereas as in Iranian law, the UCC permits him to reject even if the seller’s breach is slight.¹¹³ Secondly, in contrast with the English system under which the contract is generally considered to have been repudiated by the buyer’s rightful

¹¹³ The perfect tender rule under section 2-601 is, however, inapplicable to instalment contracts. See, UCC, Section 2-612. As to the position of Iranian law concerning short delivery, see pp. 114-115, post.

rejection of the goods,¹¹⁴ in certain circumstances, as pointed out above,¹¹⁵ the UCC, grants the seller a right to preserve the contract by curing the non-conformities after rejection or revocation by the buyer.¹¹⁶ Moreover, while the buyer following the UCC is generally required to act in good faith in rejection or revocation of the acceptance, there is, unlike in the Iranian and the French systems, no corresponding provisions under English law to prevent him from acting in bad faith concerning repudiation of the sale through rejection of the non-conforming goods. Finally, unlike English law, where the buyer will lose the right to reject after acceptance a non-conforming article, section 2-608 of the UCC allows him to revoke his acceptance of the article “whose non-conformity substantially impairs its value to him”¹¹⁷ provided that he has accepted it:

- “(a) on the reasonable assumption that its non-conformity would be cured and it has not been seasonably cured; or
- (b) without discovery of such non-conformity if his acceptance was reasonably induced either by difficulty of discovery before acceptance or by seller’s

¹¹⁴ It seems that under English law, the buyer in general is entitled to treat a wrongful delivery as itself a breach of contract which justifies repudiation by him. See sections 11(3) and (4) of the Sale of Goods Act 1979 both of which appear to assume that rejection of the goods involves repudiation of the contract. However, where the time for performance of the contract has not been passed English Law allows the seller to cure the breach within the period allowed by the contract after the buyer’s rejection. See, *The Kanchenjunga*, *supra.*, Ch.1, note 77, at p. 399, per Lord Goff of Chieveley. See further, *Benjamin’s Sale of Goods*, *op. cit. supra.*, Ch. 1, note 17 § 8-048, pp. 401-402; Devlin, “The Treatment of Breach of Contract” (1966) *Cambridge Law Journal* 192 at p. 194...

¹¹⁵ See pp. 52-61, *ante.*

¹¹⁶ *Pratt v. Winnebago Industries, Inc.*, 463 F. Supp. 709, 26 UCC 68 (W.D.Pa. 1979).

¹¹⁷ For more discussion on this issue, see generally Priest, “Breach and Remedy For The Tender of Non-conforming Goods Under Uniform Commercial Code: An Economic Approach” (1978) 91 *Harvard Law Review* 960 at p. 994. For the cases adopting an objective view of the “to him” language, see *Herbstman v. Eastman Kodak Co.*, 68 N.J. 1, 342 A.2d 181, 17 UCC 39 (1975); *Bic Mac Mobile Homes, Inc. v. Cowgill*, 31 UCC 1619 (Ark. App 1981) (allergic reaction to mobile home). For cases where the court mainly relied on the “subjective” standard but in fact viewed the situation with some degree of objectivity in deciding whether or not to uphold the buyer’s action to revoke the acceptance, see *Stamm v. Wilder Travel Trailers*, 44 Ill.App.3d 530, 3 Ill. Dec. 215, 358 N.E.2d 382, 20 UCC 1142 (1976); *Werner v. Montana*, 117 N.H. 721, 378 A.2d 1130, 22 UCC 894 (1977); *Keen v. Modern Trailer Sales, Inc.*, 40 Colo. App. 527, 578 P.2d 668, 24 UCC 881 (1978); *Champion Ford Sales, Inc. v. Levine*, 49 Md. App. 547, 433 A.2d 1218, 32 UCC 108 (1981); *Wright v. O’Neal Motors, Inc.*, 57 N.C. App. 49, 291 S.E.2d 165, 33 UCC 1306 (1982).

assurances.”

The buyer who wishes to revoke his acceptance is required by section 2-608(2) to do so within a reasonable time after he discovers, or should have discovered, the ground for revocation and before any substantial change in the condition of the goods which is not caused by their own defects.

The advantages of the UCC’s provisions over those of English law concerning non-conformities in the goods delivered are that, unlike the latter system, the drafters of the UCC rightly, on the one hand, try not to deprive the buyer of the right to reject where despite discovery of a defect in the goods he accepts them on the reasonable assumption that it will be cured¹¹⁸ or where his failure to discover the nonconformity was “reasonably induced either by the difficulty of discovery¹¹⁹ before acceptance or by the seller’s assurance”, and on the other hand, encourage the parties to preserve the contract which has been validly made by them through granting of a right to the seller to cure the nonconformity.

Following section 2-608(3) of the UCC, a buyer who successfully revokes his acceptance has the same rights and duties with regard to accepted goods as if he had rejected them.

The remedies of a buyer who rightfully rejects the non-conforming goods or properly revokes his acceptance under the UCC are identical to those granted to him under English law for his repudiation of the contract through rightful rejection of the goods. This means that the buyer in either of those circumstances may generally avoid liability for the price under section 2-709. Both these remedies generally have the virtue of enabling the buyer to avoid liability for the price. Also, in an appropriate case, under section 2-711(1) a buyer who rightfully rejects or who properly revokes acceptance may following to section 2-106(4) of the UCC also cancel the transaction

¹¹⁸ For example, where the seller states that he will cure the defect. See *Polycon Industries, Inc. v. Hercules Inc.*, 471 F. Supp. 1316, 26 UCC 917 (E.D.Wis. 1979); *Automated Controls, Inc. v. MIC Enterprises, Inc.*, 27 UCC 677 (8th Cir. 1979). A past course of dealing or usage of trade may also make it reasonable to conclude that the seller will cure. See *Gindy Mfg. Corp. v. Cardinale Trucking Corp.*, 111 N.J.Supper. 383 A.2d 345, 7 UCC 1257 (1970).

¹¹⁹ Accordingly, the buyer is barred from revocation of his acceptance if he failed to make a

with the seller and either recover damages for non-delivery under section 2-713 or cover and claim cover damages under section 2-712.

The buyer's right to cover under section 2-712

As pointed out above, where the buyer properly rejects or justifiably revokes he may resort to the remedy provided in section 2-712 of the UCC to cover and claim cover damages from the seller. The same remedy is available to the buyer if the seller repudiates the contract or fails to make delivery to the former. Section 2-712 states:

“(1) After a breach within the preceding section the buyer may “cover” by making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller.

(2) The buyer may recover from the seller as damages the difference between the cost of cover and the contract price together with any incidental or consequential damages as hereinafter defined (section 2-715), but less expenses saved in consequence of the seller's breach.

(3) Failure of the buyer to effect cover within this section does not bar him from any other remedy.”

The provisions of this section, which have no precedent in common law systems, have been derived from the civilian systems¹²⁰ and entitle the buyer to purchase substitute goods in the event of the seller's breach and to recover from the latter the difference between the cost of the substitute goods and the original contract price, plus any incidental or consequential damages allowable under section 2-715, but less expenses saved as a result of the seller's breach.

The major difference between French law and section 2-712 of the UCC concerning the buyer's right to cover is that under the former system the buyer cannot avail himself of this remedy without obtaining the court's authority, which may be done only if the goods sold have not been ascertained by the parties or if direct enforcement of the contract of the contract is not possible for any reason, whereas under the UCC, irrespective of whether or not the goods have been ascertained to the contract, the buyer may automatically resort to this remedy once he

reasonable inspection and such would have revealed the nonconformity in the goods purchased.

¹²⁰ See, e.g., French Civil Code, Article 1144 .

rightfully rejects or justifiably revokes acceptance or where the seller fails to make delivery or repudiates the contract between the parties.

Section 2-712 is a significant departure from prior US law. As in the English system, under the prior law¹²¹ if an aggrieved buyer made a cover purchase there was no assurance that the court would measure the market at or near the time when he made his purchase, and accordingly, the court's contract-market differential formula might over or under-compensate him. His actual cost of cover and the market price at the time and place of his cover were, at least in theory, irrelevant to the damage suit. Nonetheless, the main flaw concerning the cover remedy under section 2-712 is that, like French law, the buyer has to provide the capital for purchasing the replacement goods before he could be reimbursed by the seller.

There are certain interpretative problems with regard to the provisions of section 2-712 which require to be considered. The first of these lies in defining the phrases "good faith" and "goods in substitution." According to sections 1-201(19)¹²² and 1-203 the issue of good faith is to be measured upon a subjective standard, that is, honesty in fact. Moreover, a merchant buyer under section 2-103(1)(b) is required to observe "reasonable commercial standards of fair dealing in the trade" and is therefore subject to both a subjective and an objective test of good faith. It seems desirable to hold the covering to have acted in good faith unless it established that he knowingly and without any reason has avoided a less expensive market in favour of a more expensive one. This means that the court should not hold him to have acted in bad faith where he had a reasonable ground for choosing a more expensive cover (for instance, the goods are of better quality or the seller more reliable).

¹²¹ See Uniform Sales Act, Section 67.

¹²² In accordance with section 1-20(19) "'good faith' means honesty in fact in the conduct or transaction concerned."; see *Farmers Elevator Co., v. Lyle*, 90 S.D. 86, 238 N.W.2d 290, 18 UCC 1143 (1976) (buyer's acts in affecting "cover" in two transactions, nine and twenty-two days after seller's breach, held in "good faith"); *Kiser v. Lemco Indus., Inc.*, 536 S.W.2d 585, 19 U.C.C. 1134 (Tex.Civ.App.1976) (buyer's showing that he covered with purchases from himself at a stated price, without more, did not establish "good faith cover").

The standard of reasonableness under section 2-712 represents a more difficult interpretative problem for the buyer. Under this section, cover by the buyer must be made without “unreasonable delay” and it must be a “reasonable purchase.” The Comment 2 to 2-712, states amongst other things:

“The test of proper cover is whether at the time and place the buyer acted in good faith and in a reasonable manner, and it is immaterial that hindsight may later prove that the method of cover used was not the cheapest or most effective.”

Accordingly, the unreasonable delay requirement is not intended to limit the time necessary for the buyer to decide how he may best effect the cover. Section 1-204(2) defines reasonable time as follows:

“What is a reasonable time for taking any action depends on the nature, purpose and circumstances of such action.”

As can be seen, neither the provisions of the UCC nor their official comments give a solid basis upon which the buyer could determine whether a given act by him is or is not reasonable. The ambiguity of the term “reasonable” upon which the UCC’s remedy of cover is based, may in turn cause uncertainty for the aggrieved buyer who chooses to invoke this remedy. However, if the remedy of cover under section 2-712 is to be used by more aggrieved buyers than any other remedy, then one must be cautious in finding a buyer’s acts, committed in good faith, to be unreasonable.

Contract- market damages

Unlike the cover remedy, under section 2-712 of the UCC, which is an innovation in the US commercial law, the market damages formula found in section 2-713 is essentially the same as the common law formula and the formula for buyer’s damages found in the Uniform Sales Act.¹²³ The remedy formula in section 2-713 is also similar to that of section 51 of the UK Sale of Goods Act 1979. The differences

¹²³ See Childres, “Buyer’s Remedies: The danger of Section 2-713” (1978) 72 *Northwestern University Law Review* 837 at pp. 841-842.

between these two systems is that while the 1979 Act contains no provisions with respect to the place where the market price of the goods is to be measured, under the UCC the place for the measuring of the market price is the place for tender or, in the cases of rejection after arrival or revocation of acceptance, the place of arrival of the goods. Moreover, while section 51(3) of the Sale of Goods Act 1979 requires the market price to be measured at the time, or times, of delivery, in accordance with the UCC, the time for the measurement of the market price is the time when the buyer learned of the breach by the seller. Section 2-713 of the UCC states:

“(1) Subject to the provisions of this Article with respect to proof of the market price (section 2-723), the measure of damages for non-delivery or repudiation by the seller is the difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental and consequential damages provided in this Article (section 2-15), but less expenses saved in the consequence of the seller’s breach.

(2) Market price is to be determined as of the place for tender or, in the case of rejection after arrival or revocation of acceptance, as of the place of arrival”.

Accordingly, the contract-market formula is an alternative remedy which is available to the buyer in those cases where the seller repudiates the contract or where the buyer rightfully rejects or properly revokes the acceptance.

However, the provisions of the contract-market formula in section 2-713 suffers from a number of major problems which may cause uncertainty for the buyer who chooses to use this formula. The first problem relates to the requirement under which the market price is to be measured at the time and the place of the ‘tender’ of the goods, despite the fact there is no precise definition as to place of tender under the UCC. Section 2-503 of the UCC (“Manner of Seller’s Tender of Delivery”) is a good starting point to search for a definition in this regard. This section half-heartedly defines tender in the “across the counter” sale, but only in the most oblique fashion does it deal with place of tender in the common commercial contract in which the seller ships to the buyer via a common carrier. An unanswered question is still whether the tender takes place when the goods are given to the carrier or only when the carrier delivers them to the buyer? According to section 2-503(2) of the UCC:

“Where the case is within the next section respecting shipment tender requires that the seller comply with its provisions.”

This section, nevertheless, does not go on to say that tender occurs when the seller complies with section 2-504. Unfortunately, only by implication does one conclude that a seller who complies with section 2-504 has performed his duty in tendering of the goods. The implicit meaning of section 2-503(2) is that a seller who has undertaken to ship the goods to a buyer but has no obligation to deliver them at a particular destination (that is, one who has contracted to ship the goods "F.O.B. seller's plant," not "F.O.B. buyer's plant") will be considered to have properly performed the duty to tender by delivery of the goods to the carrier and contracting for proper shipment.¹²⁴ It follows that in a "destination contract", where the seller agrees not just to ship the goods but to deliver them "F.O.B. buyer's plant", tender takes place only when the carrier tender the goods in the buyer's city.¹²⁵

The second problem concerns the question of whether the buyer can claim damages on the basis of contract-market differential under section 2-713 when it is larger than those of the cover under section 2-712 while he has actually purchased substitute goods for those due from the seller. Professor Peters maintains that an aggrieved buyer who purchases goods in substitution of the contract goods may disregard the remedy of cover under section 2-712 and apply for recovery under the contract-market differential of section 2-713.¹²⁶ This approach, however, conflicts with the general principle of section 1-106 upon which the purpose of the UCC's remedies is to put the aggrieved party in as good position as if the other party had performed and no more. Furthermore, Comment 5 to section 2-713 indicates that a buyer who has covered may not use section 2-712 to recover damages on the basis of market-contract differential:

"The present section provides a remedy which is *completely alternative* to cover under the preceding section and applies *only when and to the extent that the*

¹²⁴ See *United California Bank v. Eastern Mountain Sports, Inc.*, 546n F. Supp. 945, 34 UCC 849 (D.Mass.1982); *re Ault*, 6 Bankr. 58, 30 UCC 1714, (E.D.Tenn.1980).

¹²⁵ See *Ladex Corp. v. Transportes Aereos Nacionales S.A.*, 476 So.2d 763, 42 UCC 133, (Fla. App. 1985).

¹²⁶ See Peters, "Remedies for Breach of Contracts Relating to the Sale of Goods Under the Uniform Commercial Code: A Roadmap for Article Two", (1963) 73 *Yale Law Journal* 199, at p. 260.

If the UCC’s goal is to put the buyer in the same position as if there had been no breach and if the cover remedy under section 2-712 will accomplish this goal, but recovery of the market-contract differential price will do so only by coincidence, then there seems to be no reasonable ground not to force the covering buyer to use the remedy under the former section.

Another interpretative question with respect to section 2-713 is whether the aggrieved buyer’s remedy under this section is to be limited to no more than what he stood to gain had the seller delivered the goods in conformity with the contract. It appears that despite the unqualified language of section 2-713 US courts have accepted the idea that a buyer is not entitled to the full contract-market differential where there is proof that he expected to gain less than this differential, assuming the seller actually delivered the goods. In *Allied Cannery and Packers Inc. v. Victor Packing Co.*,¹²⁸ for example, the Court relied mainly on the principle of section 1-106(1) (as good a position as if the other had performed) and concluded that the plaintiff/buyer was entitled to cover only its expected resale profits which were less than the contract-market differential. The decision, however, is inconsistent with the provisions of section 2-711 of the UCC which grants the aggrieved buyer an option to recover damages for non-delivery under section 2-713 where he wishes to do so. Moreover, it is unjustifiable to follow the foregoing decisions in the cases where the plaintiff’s resale purchaser is likely to insist on upon performance. There is equally no justification why the breaching seller’s liability in such instances should be limited to the buyer’s expectancy profit where, unlike the case of *Allied Cannery and Packers Inc. v. Victor Packing Co.*, the seller intentionally declines to deliver the goods sold. The seller in such instances is set to be substantially better off by, for example, reselling of the goods to an alternative customer even after full payment of damages to the buyer under the market-contract formula in section 2-713.

¹²⁷ The italics added.

¹²⁸ 162 Cal. App. 3d 905, 209 Cal. Rptr. 60, 39 UCC Rep. Serv. (Callaghan) 1567 (Cal. App. 1984); see further, *H-W-H Cattle Co. v. Schroeder*, 767 F.2d 437, 41 UCC 832 (8th Cir. 1985).

Furthermore, the main common goal of the parties in dealing with each other is to perform their respective obligations undertaken under the transaction. To prevent the buyer from full recovery of his damages under the market-contract formula in the foregoing instances may persuade the seller to breach his contract intentionally whenever he finds it beneficial to him to do so.

Finally, assuming that an aggrieved buyer can find the proper place and time to measure the market price for the purpose of recovering of damages under section 2-713's formula, there is still a question concerning the type of proof of the market price which he needs to show in order to prove his damages claim. In accordance with Comment 2 to section 2-713:

“The market or current price to be used in comparison with the contract price under this section is the price for goods of the same kind and in the same branch of trade.”

Commodity and securities markets, of course, fit the description of “general market price” provided in this official Comment. It would also seem that an aggrieved buyer could usually find a general market for widely sold goods, such as new and old cars or bicycles. Where the buyer cannot find such a market at the time and the place at which the market price is to be measured, section 2-723 of the UCC allows him reasonable leeway in time, in place, and in kinds of substitutes. Official Comment 3 to section 2-713 goes even further by approving the use of evidence of spot sale prices where there is no available market price. However, a seller may still argue that some evidence is too uncertain to be received in a court of law. In fact, there is a remarkable number of the instances in which respective aggrieved buyers lost their cases either because they could not show adequate evidence of market price or because they failed to produce their evidence on time.¹²⁹ These cases indicate that, in contrast with the cover remedy, there is a high possibility that the buyer may lose the

¹²⁹ See, e.g., *Maxwell v. Norwood Marine, Inc.*, 58 Mass. App. Dec. 59, 19 UCC 829 (1976); *Three-Seventy Leasing Corp. v. Ampex Corp.*, 528 F.2d 993, 19 UCC 132 (5th Cir.1976); *Gulf Chem. & Metallurgical Corp. v. Sylvan Chem. Corp.*, 122 N.J. Super. 499, 300 A.2d 878, 12 UCC 117, *aff'd*, 126 N.J. Super. 261, 314 A.2d 73, 14 UCC 123 (App.Div.1973); *H-W-H Cattle Co. v. Schroeder*, 198 Neb. 153, 251 N.W.2d 888, 21 UCC 794 (1977).

case against the breaching seller to recover damages under the contract-market formula.

Incidental and consequential damages of the buyer

In accordance with sections 2-711, 2-712, 2-713 and 2-714 of the UCC, an aggrieved buyer, in addition to recovery of any proximate or general damages, may also claim “incidental and consequential damages” caused by the seller’s breach. Incidental and consequential damages have been defined by section 2-715 of the UCC as follows:

“(1) Incidental damages resulting from the seller’s breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expenses incident to the delay or other breach.

(2) Consequential damages resulting from the seller’s breach include

(a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and
injury to person or property proximately resulting from the breach of warranty.”

In an effort to distinguish between incidental and consequential damages the court in *Petroleo Brasileiro, S.A. Petrobras v. Ameropan Oil Corp.*¹³⁰ stated:

“While the distinction between the two is not obvious one, the Code makes plain that *incidental damages* are normally incurred when a buyer (or seller) repudiates the contract or wrongfully rejects the goods, causing the other to incur such expenses as transportation, storing, or reselling the goods. On the other hand, *consequential damages* do not arise within the scope of the immediate buyer-seller transaction, but rather stem from losses incurred by the non-breaching party in its dealings, often with third parties, which were a proximate result of the breach, and which were reasonably foreseeable by the breaching party at the time of contracting.”

Incidental damages

Incidental damages claims, provided for in section 2-715(1), are limited to expenses which are recoverable if the buyer can show that they were incurred incidental to the

¹³⁰ 372 F.Supp. 503, 508, 14 UCC 66, 667 (E.D.N.Y.1974).

seller's breach and that they were reasonable.¹³¹ The limitation on recovery of incidental damages exists to further the UCC's general policy expressed in section 1-106 whereby the aggrieved party is to be placed "in as good a position as if the other had fully performed."¹³² Where the goods have been rightfully rejected, or the buyer has properly revoked his acceptance, incidental damages are fairly easy to identify as those expenses incurred in dealing with the goods themselves and in effecting cover. In such instances, the buyer may recover, as incidental damages, the cost of their inspection as well as storage and transportation expenses.¹³³ Nevertheless, incidental damages are not so easy to define where the goods have been retained. To illustrate this, the additional expenses sustained by the buyer for locating and transporting the goods to the place of delivery from the location to which the seller has wrongfully shipped, can be classified as incidental as well as consequential expenses. Generally, the category chosen is not significant. Occasionally, however, the categorisation may be important for incidental damages are more readily recoverable than consequential damages.¹³⁴

Consequential damages

Consequential damages which are recoverable under section 2-715(2)(a) of the UCC may include sums for lost profits, losses resulting from interruption of the buyer's production process, loss of good will, lost interest, and much else. Nevertheless, the

¹³¹ See, e.g., *Industrial Graphics, Inc. v. Asahi Corp.*, 485 F.Supp. 793, 28 UCC 647 (D.Mn.1980).

¹³² See, for example, *Productora e Importadora de Papel, S.A. de C.V. v. Fleming*, 376 Mass, 826, 383 N.E.2d 1129, 25 UCC 729 (1978).

¹³³ See, e.g., *Western Conference Resorts, Inc. v. Jeffrey M. Pease*, 668 P.2d 973, 977, 36 UCC 131, 136 (Colo.App.1983); *Creusot-Loire Intern., Inc. v. Coppus Engineering Corp.*, 585 F.Supp. 45, 51, 39 UCC 186, 195 (S.D.N.Y.1983).

¹³⁴ For detail of the restrictions imposed on the buyer's right to recover consequential damages, see below pp. 73-74. See further, *Council Bros. v. Ray Burner Co.*, 473 (5th Cir. 1973), where a seller's contractual exclusion of consequential damages successfully precluded the recovery of those damages, but not incidental damages.

buyer may recover consequential damages only if he can prove (a) that the damages were caused by the seller's breach, (b) that these damages were in contemplation of the parties at the time of contract, and (c) that the damages occurred despite his normal or reasonable efforts to mitigate them.

As in the civil law systems,¹³⁵ the buyer who is claiming consequential damages is required by the UCC to show that they were caused by the seller's breach.¹³⁶ On this basis, when the buyer's own negligence is a concurring proximate cause of the damages, the court will assess damages in proportion to the respective causal contributions.¹³⁷

The second, and perhaps the most important, limitation on the recovery of consequential damages is the requirement of foreseeability of the consequential damages at the time of the conclusion of the contract. The doctrine of foreseeability which has been derived from the rule in English case of *Hadley v. Baxendale*,¹³⁸ is justified on the ground that the breaching party should not be forced to bear unexpected liability for the breach. However, this reasoning is not convincing where the breach is attributable to the seller's bad faith particularly if the damages were reasonably foreseeable by him at the time of the breach. In fact, in contrast with the civilian systems, the provisions of both the UCC and English law in such instances unjustifiably favour the seller. These provisions, along with the duty to mitigate imposed on the aggrieved buyer by both the UCC¹³⁹ and English law, may, unlike

¹³⁵ As to the French system, for example, see pp. 98-100, post.

¹³⁶ See, e.g., *J & J Farms, Inc. v. Cargill, Inc.*, 693 F.2d 830, 836 (8th Cir. 1982); *Perry v. Lawson Ford Tractor Co.*, 613 P.2d 458, 464, 29 UCC 75, 82 (Okla. 1980)

¹³⁷ See, e.g., *Indust-Ri-Chem Laboratory, Inc. v. Par-Pak Co., Inc.*, 602 S.W.2d 282, 290, 29 UCC 794, 804-5 (Tex. App. 1980).

¹³⁸ 9 Ex. 341, 354-355, 156 Eng. Rep. 145 (1854), 151. See further, pp. 25-28, 30, ante.

¹³⁹ UCC, Section 2-715(2). For example, see; *Plastic Moldings Corp. v. Park Sherman Co.*, 606 F.2d 117 (6th Cir. 1979); *S.J. Groves & sons v. Warner Co.*, 576 F.2d 524 (3rd Cir. 1978); *Carl Beasley Ford, Inc. v. Burroughs Corp.*, 361 F.Supp.325 (E.D. Pa. 1973). Unfortunately, the buyer's failure to cover as authorised by section 2-712 has been used as a breach of the duty to mitigate by a number of courts to reject his rightful claim to recover the consequential damages that actually resulted from the seller's breach. See, e.g., *Hayes v. Hettinga*, 228 N.W.2d 181 (Iowa 1975); *Wilson v. Hayes*, 544 S.W.2d 833 (Tex. App. 1976); *S.J. Groves & Sons v. Warner Co.*, 576 F.2d 524 (3d Cir. 1978).

civilian systems, encourage the seller wilfully to breach the contract whenever he finds it beneficial to him to do so through, for example, reselling the goods to a third party for a substantially higher price.

Specific performance

While specific performance under the civilian systems is the buyer's prime remedy,¹⁴⁰ under sections 2-716 and 2-502 of the UCC, it could be regarded as a secondary remedy which is obtainable only in certain circumstances. The availability of specific performance under section 2-716 (1) is a manifestation of the English equity principle¹⁴¹ which holds that where money damages are inadequate to put an aggrieved party in the same position as performance would have done, the court of Equity will decree that an agreement be specifically performed, even though this section omits any express proviso that the damages remedy at law be inadequate.¹⁴² In other words, as Comment 1 to the section 2-716 reveals, the drafters of UCC intended to follow "in general prior policy as to specific performance and injunction against breach." But, they also sought "to further a more liberal attitude than some courts have shown" toward specific performance by deleting the Uniform Sales Act's requirement that the goods be "specific" or "ascertained" and instead authorising the courts to instruct a breaching seller to perform the contract specifically "where the goods are *unique* or *in other proper circumstances*."¹⁴³ These changes indicate that the drafters of the UCC sought to take a more liberal attitude toward the availability of specific performance than existed under the Uniform Sales Act.¹⁴⁴ Nonetheless, while some courts comply with this attitude, which is also consistent with the guideline set in Comment 1 to section 2-716, others continued to follow the

¹⁴⁰ As to Iranian system, for example, see 122-127, post.

¹⁴¹ See pp. 31-35, ante.

¹⁴² See for further discussion on this issue, White & Summers, *Uniform Commercial Code, op. cit. supra.*, note 110, at pp. 325-336

¹⁴³ The italics added. See generally, H. Greenburg, "Specific Performance under 2-716 of the Uniform Commercial Code: a more liberal attitude in the 'grand style'" (1982) 87 *Commercial Law Journal* 583.

¹⁴⁴ See, White & Summers, *op. cit. supra.*, note 110, at p. 326.

traditional attitude in granting specific performance only where the buyer's remedy at law is inadequate.¹⁴⁵ Obviously, the consequence of such a division among the decisions of the courts is to further the existing uncertainties between the parties concerned.

The second problem is caused by the ambiguity of the words "unique or in other proper circumstances" used in section 2-716. Surely, specific or ascertained goods such as priceless works of art or treasured heirlooms will remain "unique" as required by this section, but Comment 2 to section 2-716 propounds a more liberal approach in determining whether the subject matter of a sale is "unique":

"The test ... must be made in terms of the total situation which characterises the contract. Output and requirements contract involving a particular or peculiarly available source or market present today the typical commercial specific performance situation."

Under this approach the courts should take notice of the commercial feasibility of replacement in granting specific performance. In the cases of output and requirement contracts quoted above, if the seller repudiates the contract and if the described goods are available only in a particular or peculiarly available market, the buyer may obtain a decree of specific performance because he cannot acquire the described goods elsewhere and his money damage remedy would therefore be inadequate to make him whole.

The UCC states that even if the subject matter of the sale is not unique, the buyer may still obtain a decree of specific performance if he can show "other proper circumstances." Drafters of the UCC failed to clarify which other circumstances are to be considered as "proper" to allow the buyer to obtain an injunction against the seller's breach. In accordance with Comment 2 to section 2-716:

"[T]he relief may also be granted "in other proper circumstances" and inability to cover is strong evidence of "other proper circumstances."

Nevertheless, this Comment does not obviate the existing ambiguity in section 2-716 for it fails to define the borders of "uniqueness" as against "other proper

¹⁴⁵ For example, see *Pierce-Odom, Inc. v. Evenson*, 5 Ark. App. 67, 632 S.W.2d 247, 33 UCC 1693 (1982); *Beckman v. Vassall-Dillworth Lincoln-Mercury, Inc.*, 321 Pa.Super. 428, 468 A.2d 784, 39

circumstances.” If, as pointed out above, “uniqueness equals “not obtainable elsewhere,” then nothing is left for the category “other proper circumstances.” As White and Summers suggest perhaps the purpose of the drafters in adding the phrase “other proper circumstances” in section 2-716 was “to preserve the traditional power of an equity court to provide or withhold specific relief in its sound discretion and subject to such traditional defences in equity as clean hands, laches, etc.”¹⁴⁶ In the case of *Laclede Gas Co. v. Amoco Oil Co.*,¹⁴⁷ for example, the court ordered an injunction against the seller who had breached a long term contract for the supply of propane gas. The breach occurred in the midst of the 1973-74 energy crisis and in view of the long term contract, the uncertain future of energy supplies and the unquestionable indication that probably could not find another seller willing to supply him propane under such a long term contract, the court concluded that:

“[E]ven if ... [the buyer] ... could obtain supplies of propane for the affected developments through its present contracts or newly negotiated ones, it would still face considerable expense and trouble which cannot be estimated in advance.”¹⁴⁸

Unlike the discretionary remedy of specific performance, in certain limited circumstances when the goods have been identified to the contract an aggrieved buyer under sections 2-716(3) and 2-502 has a right to the goods in the seller’s hand. In other words, the court is required to grant a decree of replevin if the buyer’s case fits with the terms of either of these sections.

Accordingly, unlike the position in English law, where the remedy of specific performance is unavailable, the aggrieved buyer may still resort to the provisions of section 2-716(3) of the UCC to replevy the goods identified to the contract if cover is, or reasonably appears to be, foreclosed. Where the goods have been shipped under reservation (for instance, shipment under negotiable bill of lading to seller’s order) the buyer may avail himself of the right of replevin only after satisfaction of the security interests in them has been tendered.

UCC 69 (1983); *Tower City Grain Co. v. Richman*, 232 N.W.2d 61, 17 UCC 1011 (N.D. 1975).

¹⁴⁶ White & Summers, op. cit. *supra.*, note 110, at p. 328.

¹⁴⁷ 522 F.2d 33, 17 UCC 447 (8th Cir. 1975), rev’d on other grounds, F.2d 942 (8th Cir. 1976).

¹⁴⁸ *Ibid.* At p. 40, 17 UCC at p. 452. See further *Stephan’s Machine & Tool, Inc. v. D & H Machinery*

In accordance with section 2-502(1) of the UCC:

“Subject to subsection (2) and even though the goods have not been shipped a buyer who has paid a part or all of the price of the goods in which he has a special property under the provisions of the immediately preceding section may on making and keeping good a tender of any unpaid portion of their price recover them from the seller if the seller becomes insolvent within ten days after receipt of the first instalment.”

Under this section the buyer who has at least partly paid for the goods identified to the contract has a right to get them if the seller becomes insolvent within ten days after the receipt of the first instalment on their price. Although the section resolves the paradoxical question of whether the seller’s insolvency alone is sufficient to grant specific relief to the buyer,¹⁴⁹ in several ways it prevents the latter from acquiring the goods in several ways. First, the buyer must have a special property right in the goods identified to the contract. More importantly his right is limited to the situation in which the seller becomes insolvent “within ten days after receipt of the first instalment of their price.” Under these limitations, the buyer will not be able to claim the goods if they are not identified to the contract prior or within those ten days or if the seller becomes insolvent after receiving of the first instalment of their price.

Consultants, Inc., 66 Ohio App.2d 197, 417 N.E.2d 579 (1979).

¹⁴⁹ The implication from the limited remedy afforded the buyer in section 2-502 suggests that he cannot use the seller’s insolvency as a ground to invoke the “other proper circumstances” for obtaining specific relief against the latter.

Chapter 3

Delivery of the Goods under French Law¹

Under the French system, the obligation to deliver is one of the two principal obligations in a contract of sale, which must be fulfilled by the seller.² Article 1604 of the Civil Code defines delivery as “the transfer of the thing sold into the power and possession of the buyer.” In accordance with this rule the seller is bound to deliver the thing sold to the buyer so as to cause the latter to have it as owner.

In contrast with English and US law, delivery of non-conforming goods under French law does not discharge the seller’s duty of delivery undertaken under the contract of sale. In other words, non-conformity of the goods with respect of their quantity and/or quality entitles the buyer under the French system to sue the seller for non-delivery.³

As in Iranian law,⁴ unless otherwise expressly agreed by the parties concerned⁵ the law extends the seller’s obligation to deliver to the accessories which are customarily attached to the object of the sale and all things associated with its permanent use.⁶ This includes all legal documents concerning the goods which are necessary for their administration without which the free use of the goods by the buyer would be scaled down or even disappear. Accordingly, in the cases of the sale of pedigree animals, the seller is considered to be bound to deliver to the buyer the documents relating the origin of the animal sold. This is because these documents relieve the latter from responsibility against the associations or specialised firms or

¹ It is to be noted that the translation of the French Civil Code’s Articles referred to in this thesis has been taken either from B. Nicholas in , *The French Law of Contract* (Clarendon Press Oxford, 2nd ed. 1992) or from the translation of the author’s student colleagues at Edinburgh University.

² French Civil Code, Article 1604.

³ For the concept of the term *délivrance* under French law, see pp. 135-136, post.

⁴ See p. 106, post.

⁵ *Judgement of July 30, 1946*, Cour d’appel d’Orléans [1947] Gaz pal. 1.21.

⁶ French Civil Code, Article 1615.

eventual sub-buyers to prove the authenticity of the quality concerning the origin of the animal.⁷ Similarly, the seller, in the case of a second hand vehicle, is considered to be liable for delivery of the registration document as an indispensable accessory of the vehicle, the absence of which would prevent the buyer from the proper use of the vehicle as intended by the parties in the sale.⁸

Delivery of a wrong document by the seller is regarded as a failure on his part to perform the obligation undertaken in the contract⁹ and entitles the buyer to have recourse to one of the remedies provided in the French Code for the breach of the seller's duty to deliver the goods.¹⁰

Modes of delivery

Delivery may take place by any voluntary act of the seller whereby the goods are put into the possession of the purchaser or enable him to obtain possession. The term includes constructive or symbolical delivery.¹¹ The parties may agree on the mode of the delivery in the contract of the sale. Accordingly, as in the other legal systems, the seller may effect his obligation as to the delivery by physical transference or movement of the goods sold. This duty is sufficiently performed by the seller who gives the purchaser due facilities for removing the goods, or the means of immediately appropriating them, and he does not have to take them to the latter.

Where the buyer is in possession of the goods purchased, the delivery takes place by mere will of the parties. As an example, the mere will of the parties is sufficient for the performance of the delivery where a depository purchases the thing which he holds for the seller, and there is no need for a fresh physical delivery to take

⁷ See J. Ghestin, *Traité Des Contrats: La Vente* (1990 Paris) p.735 and the case cited there in note 102.

⁸ See the case of Trib. Grinst. Seine 14 octobre 1964 précité, *Gaz Pal.*1965.1.77 which is cited by J. Ghestin in *Traité Des Contrats: La Vente* (1990 Paris) p.735 note 103.

⁹ Cf. Cass. 1^{er} civ. 31 Janvier 1974, *Gaz. Pal.* 1974.1. som. P. 77, D. 1974. 384, *Bull. Civ.* 1974.1.P 30.

¹⁰ Cass. Com. 29 octobre 1968, *Bull. civ.* 1968.4. n.295.

¹¹ French Civil Code, Article 1604.

place.¹² The same principle applies when one person has the detention of goods for another and the latter sells the goods to a third party. In such a case the delivery takes place as soon as the agent, being instructed, holds the goods for the purchaser. This rule corresponds to the 'attornment' under English law by which delivery of the goods may be effected.¹³ When a possessor makes a declaration in advance indicating that he holds goods on behalf of the future cessionary upon the latter receiving cession of the right of the ownership, delivery is effected on the date of the cession and the cessionary is thereafter entitled to claim the goods from the possessor.

Delivery may also take place by mutual exchange of the parties intention where they agree that the seller will retain the possession of the goods as the buyer's agent. Similarly, depending on the nature of the transaction and its surrounding circumstances, the setting of a mark upon the goods by the buyer may be equivalent to delivery. This method of delivery applies, if at all, to articles of great bulk. Accordingly, where logs of timber are sold, marking of them by the purchaser may be considered as delivery to him.¹⁴ As pointed out earlier, the delivery may be constructive. Examples of this method are the delivery of the keys of a warehouse in which the goods are stored, or the delivery of a bill of lading for goods on board a ship.¹⁵

Where the goods are delivered to a carrier for transmission to the buyer, the delivery to the carrier is delivery to the purchaser, since the former is regarded as his agent and not the seller's.¹⁶ However this rule does not apply where the seller agrees to deliver the goods safe at the destination, and it presupposes that the goods are delivered to the carrier under a contract of sale and in accordance with its terms and that the carrier holds the goods simply for transmission to the buyer. The onus is on

¹² See J. Ghestin, *Traité Des Contrats: La Vente* (Paris: Librairie de Droit et de Jurisprudence, 1990) p. 725.

¹³ See pp. 10-11, ante.

¹⁴ See J. Ghestin, *Traité Des Contrats La Vente* (1990 Paris) p.725. It is to be noted that like most other legal systems, the effect of delivery under the French law is to pass the risk in the goods to the buyer from the time when delivery takes place. This means that the buyer upon delivery of the goods, has to pay the full price even though he does not obtain the goods, or goods in promised condition provided that they are complied with the contractual requirement at the time of delivery.

¹⁵ French Civil Code, Article 1604.

¹⁶ Cass. civ. 9.2.1926, *Gaz. Pal.* 1926.1.754, D.1926.1.209, note R. Roger, S. 1926.1.63.

the seller of unascertained goods to show that he had appropriated to the contract goods which complied with the contract.

Where goods are shipped by sea and a bill of lading is issued to the seller, the carrier holds the goods as custodian for delivery to such person as may be indicated by that bill of lading. In other words, the shipper may reserve a *jus disponendi* over the goods and this is inconsistent with delivery to the carrier being regarded as delivery to the buyer.

Expenses of the delivery

According to Article 1608 of the French Code, the seller, in the absence of an agreement to the contrary by the parties, must do at his own expense what is necessary to effect delivery. Accordingly, where the sale is one of unascertained goods, he must appropriate to the contract goods of the contract quality and description, and in contract condition. Similarly, if the goods require anything to be done to them to put them in a deliverable state, or a permit be necessary, or the goods are required to be measured, the responsibility for attending to these matters, and the expense thereby incurred, falls on the seller.

Place of delivery

The parties may expressly or by implication agree on the place where the goods are to be delivered. In the latter instance, the intention of the parties as to the place of delivery can be deduced from the stipulation in the contract concerning transport of the merchandise sold. As an example, the use of the words "arrival station" can be considered as an indication of the place of delivery which has been impliedly stipulated in the contract by the parties concerned, whereas in the sale of goods involving carriage by sea it is normally the departure station which constitutes the

place of delivery.¹⁷ Where, however, the parties have made no stipulation as to the place of delivery in the contract and there is no usage as to the place of delivery concerning that particular goods sold, under Article 1609 of the , the delivery or *traditio* of movables sold must take place at the place where the goods were at the time of the sale.¹⁸ In accordance with this rule, if a buyer has, for example, purchased from a timber merchant pieces of wood to shore up his house, the merchant must deliver the wood to the former in his yard where it is, and the buyer must bear the cost of taking the timber away.

That is why delivery, which is incumbent upon the seller, must not be confused with the removal of the thing by the buyer. The delivery is at the cost of the seller, and it consists in giving the buyer the opportunity of removing the thing. If, therefore, the buyer cannot be reasonably expected to take delivery without notice, the seller is bound to give that notice, and he must ensure that the place from which the goods are to be collected by the buyer is convenient for this purpose.¹⁹ In other words, if there be anything hindering the removal of the thing, the seller must remove the hindrance at his own expense. Thereafter, unless otherwise agreed by the parties concerned, the removal of the goods, including the loading, is the responsibility of the purchaser. It takes place at his own expense and anything necessary to that end must be done by him and not by the seller.²⁰

It is to be noted that the rule of Article 1609 concerning the place of delivery applies only in the cases where the goods sold are specified. In the event of sale of unascertained goods, however, the delivery must, under Article 1247(3)²¹ of the , take place at the place of the business of the seller,²² provided that they are not to be transported to the buyer.²³ In the latter instance, however, that is where the goods are

¹⁷ C. app. Douai 20.11.1964, D. 1965.506.

¹⁸ See French Civil Code, Article 1609.

See also *Pothier's treatise on contract of sale*, (L.S. Cushing translation, Boston, Mass., 1839), para. 52.

¹⁹ See *Pothier's treatise on the contract of letting and hiring* (Durban: Butterworth (Africa), Mulligan Translation ed. 1953).

²⁰ *Ibid.*

²¹ For the full text of Article 1247 of the French Code, see Appendix III.

²² For the same rule and its associated problems under English law, see pp. 11-12, ante.

²³ *Judgement of December 17, 1952*, Cass. civ. III 310.

to be transported, the place of tender is usually deemed to be at the place where the transportation thereof on behalf of the buyer is to start.²⁴

Time of delivery

As to the time of delivery, French law has the same basic rule as English law that the parties are free to fix the time for delivery in their contract and if they fail to do so then it is for the court (*les juges de fond*) to decide on what is a reasonable time within which the seller should deliver the goods. There, however, the resemblance between the two systems ends and indeed French law proceeds in almost an opposite direction to English law. It seems that in this, as in other instances, English law is far more geared towards commercial, and, in particular, international trading practice, than is French law.

English law, it will be recalled, holds that in mercantile contracts involving carriage of goods by sea a time clause will generally be regarded as a condition of the contract, the breach of which entitles the buyer immediately to rescind the sale and to claim damages for non-delivery.²⁵ Under French law, by contrast, a delay in delivering the goods sold is not in itself sufficient to put him in default. The buyer must give the seller formal notice (*une sommation*), or informal notice such, as a letter accepted by the *juge de fond* as being equivalent, requiring the latter to deliver the goods.²⁶ It is the issue of this notice, the *mise en demeure*, which places the seller legally in default and entitles the purchaser to claim damages from the date fixed in his letter requiring delivery of the goods by the former.

This requirement is perhaps not surprising if, under the terms of the contract, the period/ time for delivery was only indicative, and it would seem that in the case of doubt French courts tend to presume that this was so, rather than that the period/ time was mandatory.²⁷ It is more surprising if there was a firm period/term stated for

²⁴ *Judgement of November 20, 1964*, Cour d'appel, Douai, [1965] D.S. Jur. 506.

²⁵ See pp. 12-17, ante.

²⁶ See French Civil Code, Arts. 1139 and 1146.

²⁷ J. Ghestin, *Traité Des Contrats: La Vente* (1990 Paris) p. 721.

delivery which is now past. However, this may well be the case since the mere fact on its own of the contract containing a firm delivery period/time which has expired will not generally be sufficient to put the seller in default.²⁸ The issue will depend on the decision by *les juges de fond* within their sovereign power as to whether or not the provisions of the contract relating to the time for delivery were sufficiently clear and rigorous to constitute the tacit intention of the parties to dispense with the need for the notice. The inclusion of a penalty clause, the requirement *livrable de suit*, a fixed period for completion under threat of cancellation and an express provision in the form of agreement for a firm delivery period overriding the seller's general conditions of contract, are some instances where the courts have decided that the necessity for the *mise en demeure* was implicitly renounced by the parties concerned.²⁹

There are risks in relying on discretion. Buyers, therefore, will normally seek to take advantage of one of the exceptions to the rule requiring notice especially that allowing the requirement to be excluded by the express terms of the contract where they wish to avoid such a risk in their relationships with their sellers. Accordingly, the parties are considered to have waived the rule requiring notice where the goods can only be delivered within a certain period to be of any use to the purchaser. As an example, the seller cannot invoke the notice requirement as a defence against the purchaser who claims damages for non-performance of the contract where he receives an order from the latter for goods to be resold at a particular fair but fails to deliver them by the time the gates of the fair are closed.³⁰ The same rule applies when the seller has stated that he does not intend to deliver the goods sold.³¹ Furthermore, when the parties have expressly anticipated in the contract that a *mise en demeure* is not required, the seller cannot rely on the rule requiring the buyer to give the seller notice demanding that the latter fulfil his obligations under the contract of sale. This

²⁸ Weill, A. And Terré, F., *Droit civil, les obligations*, (4th ed., Paris: Dalloz, 1986) para. 418. They refer to the present law as being opposed to the pre-Revolutionary French law which did not put the debtor into *demeure* by reason only of his not having delivered by the firm date and followed in this respect the latin maxim *dies interpellat pro homine*.

²⁹ See French Civil Code, Article 1610.

³⁰ Cass Com. 2 April 1974, D.1974 IR 152.

³¹ Req. 4 January 1927, DH 1927, 65.

is the most important exception and one which the buyer will normally seek to follow. Nevertheless, it is again for *les juges de fond* in the exercise of their sovereign power to decide as to whether or not the parties have expressed their intention with sufficient clarity.

Where the parties have set a specific date in their contract for delivery of the thing sold, such delivery date must be scrupulously respected.³² In such instances, the buyer may not demand early delivery³³ and the seller may neither unilaterally postpone the time of delivery nor obtain a judicial order authorising such postponement.³⁴ The buyer, unlike the case where no time for delivery is specified in the contract of sale, need not serve a request for delivery on the seller unless an express provision in the contract requires him to do so.³⁵ Where, however, the parties have specifically agreed on delivery to be made upon the buyer's demand, such demand must be made by him within a reasonable period of time.³⁶

Where the parties to a contract do not stipulate for delivery of the goods at a specific date, but "upon production" or "as soon as possible," the seller, nonetheless, is bound to deliver the goods within a reasonable time.³⁷ Where the contract of sale contains a provision suggesting a non-binding date for delivery, the seller will not, in principle, be liable to pay damages to the buyer for failing to deliver the goods on or before the non-binding date specified in the contract.³⁸ As a consequence, the buyer, in such instances, must serve a demand for delivery on the seller and accord the latter a reasonable period of time within which to deliver the goods.³⁹ Unlike the Iranian system,⁴⁰ where the time for delivering of the goods has not been fixed by the

³² *Judgement of June 16, 1952*, Cour d'appel, Paris, [1952] *Gazette du palais* [Gaz. Pal.] II 281.

³³ *Judgement of January 14, 1958*, Cass. civ. com., [1958] Bull. Civ. III 20.

³⁴ *Judgement of December 19, 1903* Cour d'appel, [1904] Gaz. Pal. I 22.

³⁵ *Judgement of January 17, 1961*, Cour d'appel, Rouen, [1962] D.S. Jur. Som. 30.

³⁶ *Judgement of December 9, 1903*, Cour d'appel, Besançon, [1904] Gaz. Pal I 22. As pointed out earlier, such a reasonable period of time is determined by reference to a trade usage.

³⁷ *Judgement of January 4, 1978*, Cour d'appel, Reims, [1978] *Revue Trimestrielle de Droit Commercial* 591.

³⁸ *Judgement of June 15, 1981*, Cass. civ. com., [1981] Bull. Civ. IV 214. It is to be noted, however, that the seller was held to have unilaterally and tacitly terminated the contract of sale where he failed to perform his obligation to deliver the goods to the buyer for a period of three months after non-binding date specified in the sale. See *Judgement of June 24, 1980*, civ. com., [1981] D.S. Jur. I.R. 40.

³⁹ *Judgement of June 2, 1958*, Cass. civ. com., [1958] Bull. Civ. III 183.

⁴⁰ See pp. 112, post.

contract, the parties are usually not presumed to have agreed that the delivery will take place immediately.⁴¹ In such instances, trade usage mostly requires the buyer to serve a demand for delivery of the goods on the seller.⁴² Where such a demand is served upon the seller, he is bound to observe the delivery date requested by the buyer if such date is reasonable under the provisions of the trade usage.⁴³

In the case of delay by the buyer in asking the seller for delivery, the latter may, if he wishes to discharge himself from the obligation undertaken under the contract, make a demand upon the buyer to take delivery at the place the goods sold are to be delivered.⁴⁴ However, as in English law, delivery of the goods and payment of the price are concurrent conditions under the French system; the seller is excused from the obligation to deliver the goods to the buyer where the latter refuses to tender the purchase price,⁴⁵ unless of course the parties agree that the payment be made at a latter date. Similarly, where a single contract of sale which calls for multiple deliveries is subject to the buyer's payment for deliveries which already have been made, the seller may refuse to make subsequent deliveries if the buyer has failed to pay for preceding deliveries.⁴⁶ Nonetheless, where multiple deliveries are to be made pursuant to the contract of sale which has not specified that all deliveries are inter-related, the buyer's failure to pay for one delivery does not relieve the seller from liability for failing to make subsequent deliveries to the buyer.⁴⁷

The buyer's action against the seller for non- delivery

The action the buyer may have against the seller for non-delivery of the goods sold lies: (a) where the seller is able to deliver, but refuses to do so; (b) where by his own act he has disabled himself from delivering them, as where after the contract, he allows them to perish by his own fault; and finally,

⁴¹ *Judgement of April 4, 1960*, Cour d'appel, Paris, [1960] D.S. Jur. 410.

⁴² *Judgement of June 15, 1981*, Cass. civ. com., [1981] Bull Civ. IV 214.

⁴³ *Judgement of November 27, 1961*, Cass. civ. com., [1961] Bull. Civ. III 380.

⁴⁴ *Pothier's treatise on the law of letting and hiring*, op. cit., *supra.*, note 19 .

⁴⁵ French Civil Code, Article 1612.

⁴⁶ *Judgement of January 23, 1961*, Cour d'appel, Grenoble, [1961] D.S. Jur. 300 .

(c) where, even though at the time when the sale was made he had no power to dispose of the goods, he rashly bound himself to do so. This takes place not only when he knew that he has no right of disposal over the goods, but even when he believes in good faith that the goods belong to him and thus he is entitled to dispose of them. In other words, even though one may sell what belongs to another, *res aliena vendi potest* [what belongs to another may be sold], in the sense that, he who sells a thing belonging to another, validly contracts the obligation to deliver and warrant it to the buyer, but good faith on the part of the seller, even though he has good reason to believe that what he is selling belongs to himself, does not relieve him from the liability for damage owing to the buyer for non-performance of his obligation to deliver the goods to the latter under Article 1603 of the French Code. This is because, under the French civil law, in order that an obligation may be valid, it is sufficient if the thing which one promises to do be possible in itself, and it is not necessary that it be in the power of the promisor to do it. He has to pay for having promised what he could not perform. The promisee is entitled to rely upon the promise, as what was promised was in itself possible.

It is otherwise when the seller cannot deliver the thing sold, because it has perished or because it has become a *res extra commercium*, for example, if the thing sold has been destroyed by some occurrence other than by the act or fault of the seller, as where the cars sold are destroyed in an earthquake. In such instances, the seller is discharged from his obligation of delivering the thing sold, for the obligation has become impossible to fulfil and *impossibilium nulla obligatio est*, and the action *ex conducto* does not lie. But the buyer on the other hand, is discharged from the obligation of paying the price and if he has paid the price in advance, he can recover it, *conditio sine causa*.

⁴⁷ *Judgement of July 2, 1924, Cass. civ., [1926] D.P. I 95.*

The buyer's remedies for non-delivery of the goods by the seller:

Introduction

The law prescribes certain remedies to the buyer in the event that the seller fails to deliver or improperly delivers the goods called for in the sale contract if the latter has no excuse for improper or non-delivery of the goods sold. In such instances the buyer may affirm the contract and demand due performance thereunder or avoid the contract. Unlike the English law of sale, the buyer is free to elect either of these courses of the action; in the event that he initially elects one course of action, he may subsequently change his mind and elect the other.⁴⁸ Nonetheless, one must bear in mind that both procedures involve judicial authorisation and the buyer cannot act on his own initiative. Thus, whereas the aggrieved buyer under the common law may rescind the contract with the seller for non-delivery of the goods merely by giving notice to the latter, French law normally requires a court proceeding.⁴⁹ The only exception to this general rule, (i.e., rejection of the self-help rule) under the French law is purely defensive and allows the buyer to withhold payment of the price in the event of default by the seller to deliver the goods. This exception is called *exceptio adimpleti contractus* and can be used against a seller who demands the payment of the price before performing his obligation of delivering the goods in accordance with the contractual terms. However, in a particular case, commercial custom may allow the purchaser recourse to self-help without being required to refer the case to a court. In such instances, judicial control may intervene only *ex post*, in the event of an improper exploitation of the right. This substitution of right by commercial custom is sometimes regarded as a form of unilateral automatic rescission

⁴⁸ *Judgement of July 22, 1953, Cass. Civ. Com., [1953] Dalloz, Jurisprudence 587.*

⁴⁹ See, P. Le Tourneau, *La Responsabilité Civile* (3rd ed. 1982), no. 1762.

The term *exceptio non adimpleti contractus* which has been derived from the Roman law and its French translation *exception d'inexécution*, literally means 'defence of unperformed contract'.⁵⁰ Nonetheless, the remedy is generally available to a party in a bilateral contract in which his obligations are concurrent with those of the other party without any need of the court's order and as such it is inconsistent with the literal meaning of the term *exceptio non adimpleti contractus*.⁵¹ This is because the word *exceptio* suggests a defence to an action, whereas it is an essential characteristic of the remedy which allows the party to use it without being required to go to court (though he may decide to do so).⁵²

Thus, in a contract of sale the buyer may withhold the price if the seller fails to deliver the thing sold.⁵³ The basis of this remedy is the doctrine of cause, since it is argued that in a synallagmatic contract each obligation is the cause of the other, and therefore, the non-performance of one justifies the non-performance of the other.⁵⁴ This remedy, however, is essentially temporary and provisional. In other words, despite availability of this remedy to the buyer, he must be prepared to pay the purchase price to the seller as soon as the latter delivers the goods to him. It might be argued that this situation is inconvenient to the aggrieved buyer as it will tie him up under the contract for a long period. The argument, however, is not convincing since this is one of the options which can be used by the buyer where he wishes to retain the contract of sale without referring the case to a court. This option does not preclude the buyer from bringing an action against the seller for the repudiating of

⁵⁰ See, B. Nicholas, *The French Law of Contract*, *op. cit. supra.*, note 1, p. 213.

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ The French Civil Code does not expressly provide that the buyer can refuse to pay the price until he receives the delivery of the goods purchased. Nevertheless, by analogy to the provisions of Article 1653, one may achieve this conclusion. According to Article 1653 of the Code the buyer may suspend payment of the price where he is threatened or has good cause to fear to be evicted, until the seller removes the threat or gives an assurance. The same remedy has been provided by Articles 1612 and 1613 of the Code to an unpaid seller. According to these articles the seller may withhold delivery of the goods sold where the buyer refuses to pay the price. This is parallel to the English rule of unpaid seller's lien. See Sale of Goods Act 1979, Section 41.

⁵⁴ See, B. Nicholas, *The French Law of Contract*, *op. cit. supra.*, note 1, p. 214.

the contract altogether or for compelling the latter to perform his obligation in delivering of the goods. Accordingly, it can be said that this remedy provides the buyer with a means by which he may put pressure on the seller to fulfil his obligation under the sale without affecting his other remedies in demanding a court to compel the latter to deliver the goods or repudiate the sale with him. There is, in fact, an evident relationship between the *exceptio* and the *droit de rétention* for both serve the same purpose of putting pressure on a debtor by withholding that to which he is entitled, and the two are often indistinguishable.⁵⁵ The unpaid seller's retention of the goods sold, for example, can be seen as an instance of both of the *exceptio* and of the *droit de rétention*.⁵⁶ It is to be noted, however, that the concept of *exceptio* is much wider, in that the creditor is not confined to retaining a specific thing to which the creditor is entitled.⁵⁷ The right by the buyer to withhold payment of the price under Article 1653 of the French Code for being threatened by eviction cannot be classified as *droit de rétention* as a sum of money is not a specific thing.⁵⁸ The same is true where the performance withheld by the creditor is an act rather than delivery of a specific thing.⁵⁹ On the other hand, a *droit de rétention* not only is not confined to synallagmatic contracts, for an example, a creditor under a unilateral contract may withhold a thing belonging to the debtor where he holds that thing in connection with the contract; but it may also apply in the cases where there is, in fact, no contractual relationship between the parties, as an example the finder of a property is entitled to retain it until he is compensated for the expenditure which he has been incurred for preserving of the property.⁶⁰

Specific performance

⁵⁵ *Ibid.*, p. 215.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

Unlike English law, under which the buyer's primary remedy for non-delivery of the goods by the seller is damages,⁶¹ from the point of view of civilian systems the aggrieved buyer's primary recourse is, in principle, to have the contract performed by the latter. In other words, the effect of the contract of sale under the latter system is to constrain the seller to perform what he has undertaken; if he refuses to do so voluntarily, the law, in principle, provides the means by which he is compelled to do so. The means provided by the law for the performance of the contract may be direct or indirect.⁶²

In the case of the sale of a specified item of property, for example, the court will issue an order for specific performance of the delivery obligation. The order is to be implemented through the court's officer, the *huissier*, by directly seizing (*saisie-revendication*) of the property sold.⁶³ Where the goods sold have not been ascertained by the parties or where the direct enforcement of the contract is not possible for one reason or the another, Article 1144 of the French Code provides that the court may authorise the buyer to obtain performance at the expense of the seller. In other words, in the event of failure by the latter to deliver the goods sold, the buyer may be authorised to purchase replacement goods, in which case the seller will be forced to make good any expenses which he has incurred in obtaining the replacement goods.⁶⁴ It is to be noted that French law distinguishes between obligations *de donner* (to transfer ownership) which concerned a contract of sale of goods and obligations *de faire ou de ne pas faire* (to perform an action or abstain from performing an action). Article 1144 of the French Code is concerned only with the cases of an obligor's failure to perform his obligation *de faire* (to do) by providing that the obligee may, in such circumstances, be authorised "to perform the obligation himself at the expense of the obligor." And the court may require "the obligor to advance the sums needed for this performance." On this basis, one may argue that the provisions of this article

⁶¹ See pp. 31-32, ante.

⁶² For this reason, the term, which is mostly referred to in French legal writing, is *exécution en nature* (performance in kind) rather than *exécution forcée* (enforced performance), the latter being only one aspect of the former. See B. Nicholas, *French Law of Contract*, *op. cit. supra.*, note 1, p. 211.

⁶³ *Ibid.*, p. 217.

⁶⁴ See B. Nicholas, *French Law of Contract*, *op. cit. supra.*, note 1, p. 217.

do not apply to the case of sale of goods which relate to the obligation *de donner*. This argument, nonetheless, is not entirely correct, since in the case of sale of a thing of general character unascertained, the seller's obligation involves with element of *faire*. Therefore, in the event of the seller's failure to deliver the goods provided in the contract, the buyer may ask the court to authorise him to buy in the goods at the seller's expense. Even in the instances of the sale of an ascertained article, the seller's duty in delivering the article sold is strictly an obligation of *faire*. Accordingly, the buyer is entitled to rely on the provisions of Article 1144 of the French Code and demand the court to authorise him to buy replacement goods at the expense of the seller where the latter refuses to deliver. This remedy is identical with the cover remedy under US law⁶⁵ and though widely used, it has the disadvantage of requiring the buyer to provide the capital for purchasing the replacement goods before he could be reimbursed by the seller. Nevertheless, unlike the position under US law, it is possible for the buyer under French law to obtain an immediate advance, through a *référé*⁶⁶ application⁶⁷, an emergency procedure which does not prejudice the eventual resolution of the issue.

Clearly, authorising the buyer to purchase replacement goods at the expense of the seller's 'surrogate performance' in such cases is an example of *exécution en nature* (performance in kind) rather than *exécution forcée* (enforced performance). Unlike the position under US law, this remedy under the French system, as pointed out earlier, involves judicial authorisation, that is the buyer must first obtain the court's order allowing him to purchase replacement goods from a third party except in cases governed by a commercial custom where a notice (*mise en demeure*) to the seller is sufficient and, generally, in the cases of extreme urgency.⁶⁸ It is only in the latter instances in which the buyer may, without acquiring the court's prior order,

⁶⁵ See pp. 65-68, ante.

⁶⁶ An emergency procedure which does not prejudice the external resolution of the issue.

⁶⁷ Where in the case of non-performance of the contract in delivering of the goods, the buyer applies for this judicial procedure, the judge des référés, a single judge, may appoint experts to determine the sums needed for purchasing of a replacement property, ordering the seller in default to advance the required sums. The procedure by *voie de référé* (interlocutory proceedings) has, however, no effect on the final decision of the court.

⁶⁸ See B. Nicholas, *French Law of Contract*, op. cit. supra., note 1, p. 217

enforce the performance of the contract by purchasing a replacement property at the expense of the seller. Judicial control may intervene only *ex post*, in the event of an improper exploitation of the right.⁶⁹

It is to be noted that the enforcement powers of the French judge are incomplete, in the sense that he does not have at his disposal a direct sanction. This is because, unlike the English legal system, there is no machinery of imprisonment for contempt of court⁷⁰ to make its order for performance of the contract effective. The device of *astreinte*, however, has largely filled this gap.⁷¹ An *astreinte* can be described as a judgement for a sum of money pronounced by the court with a view to overcoming the resistance of a recalcitrant debtor and causing him to execute the court decree. In other words, an *astreinte* is a means of putting economic pressure on the defaulting seller to deliver the goods in accordance with the contractual terms. Normally, the court orders the payment of a specified sum of money for each day during which the seller is in breach of his obligation to fulfil the contract by delivering of the goods sold. The sum so specified may be fixed either definitively (an *astreinte définitive*) or provisionally (an *astreinte provisoire*). In the former case, the court will not alter the amount of the *astreinte*, but in the latter the court reserves to itself the power to review the amount, having regard to the seller's conduct in resisting or opposing the implementing of the obligation under the contract in delivering of the goods. In neither case, however, is the *astreinte* intended simply to repair the damage likely to be suffered, or suffered, by the buyer for non-delivery of the goods. The buyer has a right to claim moratory damages for the prejudice he suffers independently of the award of an *astreinte*. The *astreinte* itself is not measured by loss which has been or may be caused by the buyer by reason of delay in delivering the goods and may be imposed though there is no such loss.⁷²

⁶⁹ Substitution is sometimes regarded as a form of unilateral automatic recession: P. Letourneau, *La Responsabilité Civile* (3rd ed., 1982), no. 1762.

⁷⁰ The law for imprisonment of a debtor for civil purposes was abolished in 1867.

⁷¹ See Nicole Catala, 'Astreintes in French Law' *Juridical Review* (1959), p. 163 and *Juridical Review* (1961), p. 53.

⁷² See Civ. 20.10.59, D. 1959.531. In this case, the court expressly stated that a provisional *astreinte* was "essentially no more than a means of conquering resistance offered to the execution of a decree, did not have the purpose of compensating damage occasioned by the delay, and was normally

Where the seller fails to comply with the court's order at the end of the period fixed in the decree, the court may order a new *astreinte* and so on. Only in the cases where there is no means for compelling the seller to perform his obligation under the contract may he (i.e., the buyer) avail himself of substitutionary relief in damages.

Résolution of the contract

As pointed out earlier, the buyer may resort to the remedy of *exceptio non adimpleti contractus* where he has not paid the price, but where he has made the payment or where he wishes to obtain a definitive release from his obligation in the place of temporary bar created by the *exceptio*, he has a further choice of rescission of the contract of sale with damages where appropriate. This remedy is based on the fundamental principle of the French law of contract that, in the case of reciprocal obligations, if one of the parties has fulfilled, or is prepared to fulfil his part and the other party has failed or, refuses, to fulfil his part, the contract between them may be set aside by the court without prejudice for any claim for damages.⁷³

According to Article 1184 of the French Code:

"A resolutive condition is always implied in synallagmatic contracts to provide for the case where one of the parties does not fulfil his obligation (*ne satisfera point à son engagement*).

In this case the contract is not resolved by the operation of the law (*de plein droit*). The party in whose favour the obligation has not been performed has the choice either of forcing the other to perform the agreement, where that is possible, or of claiming *résolution* with damages.

Résolution must be claimed by action at law and further time for performance (*un délai*) may be granted to the defendant depending on the circumstances."

The remedy of *résolution* of the contract is largely similar to the common law remedy of rescission or avoidance for breach.⁷⁴ Nevertheless, as can be seen, there are two marked differences between these systems. First, unlike the common law, the buyer, under the French system, may not simply treat the seller's breach in delivering

assessed having regard to the gravity recalcitrant debtor's fault and his resources". See further, Nicholas, *French Law of Contract*, *op. cit. supra.*, note 1, pp. 223-224.

⁷³ See Pothier, "*Law of Obligations*", p. 674.

⁷⁴ See pp. 22-24, ante.

the goods as discharging the contract, but he must normally apply to the court for an order to set aside the sale contract between the parties, except in certain cases where the *jurisprudence* allows termination of the contract without recourse to the court⁷⁵ and, of course, where there is an express clause in the contract providing for rescission in which case the buyer may avail himself of the clause if he tenders to perform his undertaking under the contract.⁷⁶ Secondly, in contrast with the common law, there are no legal criteria for distinguishing those breaches which are sufficiently serious to justify the termination of the sale and those which are not. In other words, the French law does not clarify when the court may authorise the termination of the sale for non-performance of the contract by the seller particularly where *inexécution* is other than total. The matter lies in the *pouvoir souverain* of the trial judge who, depending on the circumstances of each case and by applying the principle of good faith,⁷⁷ will determine whether to set aside the contract of sale between the parties concerned.

Where the *inexécution* is total, the court usually grants *résolution* as of course, though it may accord a *délai* under Article 1184 al 3, particularly if the circumstances shows that the buyer is seeking to take advantage of a temporary difficulty in order to escape from a bad bargain.⁷⁸ Where *inexécution* is not total, the trial judge has discretion to assess the gravity of the seller's failure in delivering of the goods to the buyer. This assessment is made to determine whether the failure is:

“of such importance that *résolution* should be pronounced immediately or whether it would be sufficiently made good by a condemnation in damages.”⁷⁹

⁷⁵ For the cases where the buyer may set aside the contract without recouring to the court's order; see pp. 98-99, post

⁷⁶ See, Judgement of a civil chamber of the Court of Cassation 5.5.1920, S. 1921.1.298. cited in Amos & Walton's "Introduction to French Law" (3rd. ed., edited by F. H. Lawson, A. E. Anton, and L. N. Brown, Oxford: Clarendon Press, 1967), p. 187.

⁷⁷ Bad faith and deliberate breach of the sale by the seller are the factors which may influence the court in granting rescission of the contract when he has partly delivered the goods sold to the purchaser. See Planiol, M. et Ripert, G. *Traité pratique de droit civil* (14 vols. 2nd ed. Paris 1952-60), 6, § 434.

⁷⁸ See B. Nicholas, *French Law of Contract*, *op. cit. supra.*, note 1, p. 242.

⁷⁹ *Ibid.*, p. 243.

The assessment of the trial court is based on the consideration of whether the buyer would have entered into the contract with the buyer had he foreseen the *inÉxecution*. In other words, in making the assessment the court has to ascertain whether the non-conformity in the goods delivered could be the cause of the buyer's obligation in payment of the price.⁸⁰ Moreover, the court will consider the economic circumstances in which the claim is made and the conduct of the parties, in order to achieve a proper balance between the advantages to the buyer and disadvantage to the seller.⁸¹ Finally, an indication of bad faith on the part of the seller in failing to deliver in conformity with the contract may justify the court to pronounce the *RÉsolution* of the contract, even if the extent of the failure is not considerable. On the other hand, the court may dismiss an allegation by the buyer for *rÉsolution* of the sale if he has not acted in accordance with the requirement of the good faith under the French law, even if the extent of the breach is grave.⁸² The court's discretion, moreover, is not limited merely to the question of whether to grant *rÉsolution* or not, but it may also order partial *rÉsolution*, with modification of the buyer's obligation, thereby in effect setting the contract aside on terms.⁸³

As mentioned above, in certain circumstances, the *jurisprudence* allows the buyer to terminate his transaction with the seller without acquiring the court's order. Accordingly, he may set aside the contract where there is a special relationship of trust or confidence between the parties, where there is an urgent need for protection of his interest, or where the breach is so destructive of trust as to make continuance of the contractual relationship intolerable. In such cases, as in other cases of extra-judicial termination, the seller may challenge the right of the buyer to terminate the contract unilaterally, and as such, like the common law, where extra-judicial termination of a contract is the norm, the matter is ultimately subject to judicial control. Accordingly, the buyer acts at his own risk in unilaterally terminating the transaction with the seller without referring the case to the court.

⁸⁰ *Ibid.*

⁸¹ *Ibid.*; Cass req 4.3.1872, S 1872.1431.

⁸² *Ibid.*

⁸³ *Ibid.*

Similarly, as pointed out earlier, the buyer dispenses with the need for recourse to the court to acquire an order allowing him to terminate the transaction of sale where there is a clause in the contract which expressly provides for termination. For such a clause (referred to, as an echo of its Roman origin, a *pacte commissoire*) is, in general, valid. There are, however, obvious objections, not only because of the general French hostility to self-help, but also because of specification of the circumstances in which termination will take place is left entirely to the parties. There is, therefore, scope for abuse by the dominant party and courts have restrained such clauses which apply a restrictive interpretation, and, in the absence of an express and categorical formulation, they will presume that the parties have not intended to exclude the provisions of article 1184 which require the aggrieved buyer to recourse to the court whenever he wishes to terminate the contract.⁸⁴ Furthermore, even where the contractual provision by the parties are sufficiently explicit to exclude the need to have recourse to the court, the buyer must give the seller a *mise en demeure*, unless this also is expressly excluded by the parties in the contract. This last possibility is clearly open to abuse, but the *Cour de cassation* has so far declined to regulate it, though any such a provision in the contract is subject to the requirement of good faith.

Damages

General

Whatever remedy is chosen by the buyer as against the seller he may also claim damages for the loss which he has suffered as a result of the seller's non-fulfilment or delay in fulfilment of the contract.⁸⁵ In other words, damages may either constitute the principal means of substituting for performance, or may complement the other remedies, rescission or specific performance.

⁸⁴ Cass req 3.5.1937, DH 1937. 364, S 1937.1.371.

⁸⁵ French Civil Code, Article 1611.

The broad principles of French law and English law in respect of awarding damages to an aggrieved party are the same, for in both systems the purpose of the award of damages is to compensate (and no more than compensate) the buyer for a loss caused by the seller's failure to fulfil his obligation under the sale. French law starts from the proposition that compensation should cover all loss (*dommage, préjudice*) resulting from the non-performance,⁸⁶ but limit this proposition in all cases by the requirement that the loss should be the "immediate and direct consequence of the non-performance",⁸⁷ and, in the case of non-performance which is not attributable to *dol*, by a further requirement that the loss should have been foreseeable at the time when the contract was made.⁸⁸ Furthermore, under French law, the buyer should observe the requirement of *mise en demeure* (notice to perform), otherwise he will be awarded no damage as against the seller for non-delivery of the goods by the latter.⁸⁹

Dommage or préjudice

In contrast with the other remedies, the buyer is not entitled to a remedy in damage unless he can show that because of non-performance of the contract by the seller he (the buyer) has suffered a loss. According to Article 1149 of the French Code, in the event of non-delivery of the goods, the buyer may claim damages from the seller for actual loss (*damnum emergens*) which he has suffered and for the loss of gain (*lucrum cessans*) which he has been deprived.⁹⁰ As an example, the buyer may suffer positive damage or *damnum emergens*⁹¹ where the price or the expenses of delivery

⁸⁶ *Ibid.*, Article 1149.

⁸⁷ *Ibid.*, Article 1151.

⁸⁸ *Ibid.*, Article 1150.

⁸⁹ *Ibid.*, Article 1146.

⁹⁰ *Ibid.*, Article 1149.

⁹¹ This category of damages also includes any commercial trouble and inconvenience which causes to the buyer following the seller's failure to deliver the goods on due time. See Cass. Com. 1re civ. 3. 1. 1965, *Bull. Civ.* 1965.1. n. 10.

of the replacement goods is higher than the one provided for in the contract, and negative damage or *lucrum cessans* if he is deprived of a profitable re-sale.⁹²

Nonetheless, where the seller's failure to implement his obligation in delivering the goods is not due to his bad faith, then he is liable for the damages which could have been foreseen at the time when the contract was made, for he is taken to have held himself liable only for those damages. In other words, where the seller's fault in failing to perform his obligation does not amount to *dol* (and *dol* includes *faute lourde* or gross negligence) he is liable for such direct damages as was foreseeable to the parties at the time when the contract was made. He, therefore, has no liability for the losses which the non-fulfilment of the contract has caused to the purchaser and which were not foreseen at the time of the making of the contract, and still less for the profits which the non-delivery of the goods has deprived him of, if such profits were not reasonably foreseeable at the time the contract was made.⁹³ This restriction in contract (*dol* apart) to foreseeable damage is justified on the ground that the parties can reasonably be supposed to have entered into the agreement on the basis of foreseeable risks.⁹⁴

When the seller's breach to perform his obligation under the contract is attributable to his fraud, he is liable for all damages sustained by the purchaser as a consequence of the breach, irrespective of whether or not they could have been foreseen by the parties when they made the contract. In as much as the fraud of the person which causes prejudice to another, obliges him, *sive vellet, sive nolit*, to make good the prejudice, it is not necessary that the person, who has committed the fraud, should have agreed to pay damages caused by his fraud, nor consequently, that the damages should have been foreseen by the parties at the time of the contract.⁹⁵

⁹² Cass. com. 1er juin 1959, J.C.P. 1959, II.11206.

⁹³ French Civil Code, Article 1150.

⁹⁴ See B. Nicholas, *French Law of Contract*, *op. cit. supra.*, note 1, p. 229; H, L and J Mazeaud, *Leçons de droit civil* (Berton ed. 1967), s. 629.

⁹⁵ See Pothier, "Law of Obligations" § 166.

In the event of the seller's fraud, however, he is only liable for the damages of which the non-delivery of the goods was the proximate and immediate cause of, and not for those which the non-delivery was only the remote and indirect cause of.⁹⁶

Conclusion: an assessment of French law

From the examination of the French system with respect of the seller's duty to deliver it will be apparent that the provisions of this system are very similar with those of the English system with regard to the expenses of delivery,⁹⁷ the place of delivery,⁹⁸ and the modes of delivery⁹⁹ of the goods sold, and as such they are subject to the same criticisms to those of the latter system.

Concerning the time of delivery, both French and English law allow the parties to agree freely on the time when the goods are to be delivered.¹⁰⁰ Despite this resemblance between the two systems, they proceed almost opposite directions to each other in treating of the issue of the time of delivery. The main criticism to the French system concerning the time of delivery is that, unlike the position under other legal systems under considerations, the seller's delay in delivering the goods is not in itself sufficient to entitle the buyer to sue the seller for breach of the contract unless he serves a formal notice to the seller requiring him to deliver the goods. Although this approach might be justifiable in a local sale as it may serve the parties to maintain the contract between themselves where the seller have mistakenly delayed to deliver, it seems there is no such a logic in an international sale where the parties cannot easily have an access to each other. This problem along with the fact that an aggrieved buyer may not invoke any remedies without referring the case to a court highlights the gravity of the confusions and difficulties which the buyer may have to face in dealing with the issue of delay in delivery in an international sale under

⁹⁶ French Civil Code, Article 1151; See further B. Nicholas, *French Law of Contract*, *op. cit. supra.*, note 1, p. 229.

⁹⁷ See pp. 6, 83, ante.

⁹⁸ See pp. 11-12, 83-85, ante.

⁹⁹ See pp. 6-11, 81-83, ante.

French law. The parties' failure to provide a date for delivery may cause a similar problem to the buyer under French law. In contrast with provisions of English law under which the seller in such cases is to deliver within a reasonable time, under the French system he has no liability with respect of the duty of delivery before receiving a notice from the buyer demanding him to deliver the goods within a period of time set in the notice. The requirement to send a notice to the seller raises further problem as to the manner and the time of the sending and receiving of the notice by the parties concerned.

Further criticism with respect of the French law relates to the provisions dealing with the issue of the excess in quantity of the goods delivered, as there is no reasonable ground to allow the buyer to reject the whole goods and to sue the seller for the breach while he may accept those amount of the goods provided in the contract and to deal with the excess as the property of the seller.

Despite the above criticism, the French systems benefits from some positive features particularly with respect of the remedies available to the aggrieved buyer which can be considered as advantageous over the Anglo-US systems. One of these features related to the principle of good faith which prevents the seller from acting fraudulently or hiding any non-conformity in the goods from the buyer when the contract is made. In contrast with the position under the Anglo-US systems, under French law the seller who fails to comply with this rule is rightly liable for both incidental and consequential damages arising from the breach even if the seller could not reasonably foresee these damages when he made the contract with the buyer. Unlike the position under the two former systems, any contractual clause by which the seller attempts to exclude his liability with this respect will be held null and void. These provisions together with the principle of *spondet artis pertiam*¹⁰¹ under which a merchant or artisan is presumed to know of any defects in the things he sells indicate that the extent of the buyer's protection under French law is considerably wider than those of the Anglo-US law.

¹⁰⁰ See pp. 12-17, 85-88, ante.

¹⁰¹ See pp. 266, 272, 275, post.

These provisions along with the fact that specific performance of the contract under the French system is the prime remedy of an aggrieved party and that, unlike the Anglo-US systems, he has no duty to mitigate the damages caused by the breach indicate that the seller may rarely be tempted to breach the contract hoping to resell the goods to a third with a higher price or to use them in a more beneficial manner. This is because, the seller who intentionally refuses to deliver is in breach of the principle of good faith and as such, as pointed out above, is liable for both incidental and consequential damages caused by the breach to the buyer.

In summary, it seems that the remedial provisions under French law have been well articulated to maintain the contract and the balance of the parties in the contract.

Chapter 4

The Seller's Duty to Deliver the Goods under Iranian Law

Introduction

According to the Iranian Civil law¹, the seller by entering into a valid contract of sale undertakes to deliver the goods to the buyer. In fact, this obligation as an ultimate goal of the sale cannot be negated by the parties concerned, for, despite having sovereign power in choosing of the terms of their contract under the principle of freedom of contract², any agreement by the parties to negate the seller's duty to deliver the goods would be inconsistent with the provisions of Article 233(1)³ of the Iranian Civil Code and consequently, would annul the contract between them.

Article 367 of the Iranian Civil Code defines delivery as placing of the thing sold "at the disposal of the purchaser so as to grant him an absolute control of it and so he can benefit from it in any way he likes." According to this Article, taking delivery is effected when the purchaser assumes control of the object of the sale. Consequently, as in other legal systems under consideration,⁴ delivery under Iranian law may take place without transfer of physical possession of the goods to the buyer, provided that they are placed at his sole disposal so as to cause him to have them as owner.⁵ For example, where the goods are stocked in the seller's store, the delivery takes place by giving the store's key to the buyer. But such a delivery is not valid where the seller gives a copy of the key to another person.

¹ Iranian Civil Code, Article 362(3). It is to be noted that the Iranian Civil Code's Articles referred to in this thesis have been translated mainly by the author himself from the Persian language manuscript. Nonetheless, there are occasional instances where the translations of both Professor S. H. Amin, *The Civil Code of Iran*, and M. A. R. Taleghany, *The Civil Code of Iran* (1995) were used by the author.

² Iranian Civil Code, Article 10.

³ See Iranian Civil Code, Article 362.

⁴ As to the provisions of delivery under French law, for example, see pp. 81-83, ante.

⁵ See Iranian Civil Code, Article 368.

As in French law,⁶ in the absence of any stipulation to the contrary by the parties concerned, the duty to deliver under the Iranian legal system requires the seller to deliver the accessories which customarily attach to the goods sold and all things which are associated with their permanent use, even if there has been no stipulation in the contract to this effect and even if the parties were not aware of the common usage at the time of the contract.⁷ The requirement includes all legal documents concerning the object of the sale, which are necessary for its administration without which the free use of the object by the purchaser would be scaled down or would even disappear. As an example, the seller of a vehicle is bound to deliver the registration documents which are considered as an indispensable accessory of the vehicle, without which the buyer would be prevented from the proper use of the vehicle as intended by the parties at the time of the sale. In other words, the seller's failure to deliver all or some of the documents concerning the article sold would entitle the buyer to have recourse to one of the remedies provided by the Code for non-performance of the contract by the former.

According to Article 369 of the Civil Code:

“Delivery, depending on the different nature of the goods sold, may take place in various ways. It must be done in a way to be accepted as valid according to common usage.”

In other words, like the English and the French legal systems, delivery can be performed by any voluntary act of the seller which puts the object of the sale into the possession of the purchaser or enable him (the purchaser) to obtain their possession. The term includes constructive or symbolical delivery.

Modes of delivery

⁶ See pp. 80-81, ante.

⁷ See Iranian Civil Code, Articles 356. According to Article 383 of the Code:

“The delivery by the seller should contain all elements which are the parts and appurtenances of the thing sold.”

The parties are free to agree on the mode of the delivery in their contract. The seller may fulfil his duty of delivery undertaken under the contract of sale by physical transference or movement of the goods sold. Furthermore, the seller is regarded to have sufficiently performed his obligation in delivering of the goods vis-à-vis the buyer where he gives the latter due facilities for their removal, and he need not to take them to the buyer. For example, in the absence of an agreement to the contrary by the parties, the seller of specified logs of timber who provides the buyer an access to the place where the timber is to be cut down, is considered to have fulfilled the duty of delivery. Similarly, the transfer of a bill of lading for goods on board a ship to the purchaser may well be regarded as equivalent to delivery.

Where the goods are in possession of the buyer before being purchased by him, their delivery under the contract of sale will be effected by the mere intention of the parties pronounced by them at the time of the sale. Accordingly, where a person purchases an article which he holds for the seller, delivery would take place upon making of the contract by the parties and the law does not require the seller to deliver fresh physical possession to the buyer.⁸ This is because, in contrast to the position in other legal systems under consideration, Article 374 of the Civil Code⁹ allows the buyer to take the goods in his possession after entering into a contract of sale with the seller without being authorised by the latter to do so in which case delivery takes place as soon as the goods come in the buyer's possession. Of course these provisions apply only to the cases where the goods sold are specified otherwise where goods of a general nature are sold the buyer cannot take them into his possession before they are appropriated to the contract by the seller.

Where the goods are being detained by a person who is the agent of the seller, then the delivery will take place upon the receiving of the latter's instructions by the agent to hold them for the buyer. As in the law of South Africa, delivery under the Iranian system may also be effected by mutual change of the parties' intentions where they agree that the seller will retain the possession of the goods sold as the buyer's agent or as their borrower from him. Similarly, depending on the nature of

⁸ See Iranian Civil Code, Article 373.

the transaction between the parties and its surrounding circumstances, the marks set by the buyer on the goods may be regarded as delivery of the goods by the seller. Accordingly, for example, where logs of timber or live sheep are objects of the sale, the setting of marks on them by the buyer may be taken as being equivalent to delivery to him.

Unlike English and French law, under which the seller is regarded as having performed the sale by delivering of the goods to a carrier for transmission to the buyer, there is no express provision in the Iranian Civil Code to this effect. Nonetheless, it could be argued that the same rule is applicable under Iranian law. Firstly, since most of the modern systems have this rule either expressly by providing in their respective Acts or by the way of common usage, and there is no reason why an Iranian court should not apply the same rule particularly when the sale involves carriage of goods from, or to, a foreign country. Secondly, the Iranian Civil Code, is basically derived from French and Belgian law, with trivial changes, is made compatible with Islamic law. Since both the French and Belgian systems consider the delivery to the carrier as tantamount to delivery to the purchaser and as this rule is not inconsistent with Islamic principles, it is possible to say that the rule is also applicable under Iranian law, despite the fact that it has not been expressly provided in the Civil Code. In other words, the law regards the carrier as the buyer's agent who receives the goods for transmission to the buyer. However, this rule, as in other legal systems, should not relieve the seller from liability for performing the contract where he carries the goods or where the carrier is his agent. Similarly, the law should not consider the seller to have performed the contract by delivering the goods to the carrier where the former has undertaken to deliver the goods safely at the destination. In such instances, the goods are presumably delivered to the carrier in accordance with the terms of the sale and he holds the goods simply for transmission to the purchaser.

Where the goods are to be transported by sea and the carrier issues a bill of lading to the seller, he becomes the depositary to the seller for delivery the goods to

⁹ For the full provisions of this Article, see Appendix IV.

such person as may be indicated by that bill of lading. In fact, in such instances, the seller, as the shipper of the goods, may retain a *jus disponendi* over the goods. Obviously, the vesting of such a power in the seller over the object of the sale is inconsistent with the foresaid rule that regards the delivery to the carrier as being equivalent to delivery to the purchaser.

Expenses of delivery

The provisions concerning the expenses which are to be met for delivery of the goods to the buyer under Iranian law correspond with those of English and the French systems.¹⁰ These provisions require the seller to do at his own expense what is necessary to put the goods in a deliverable state and thereby to effect the duty of delivery undertaken under the contract of sale, unless the parties, under the principle of freedom of contract, agree that the buyer must bear some or all of the expenses mentioned above. Consequently, in the absence of any stipulation to the contrary in the contract, it is the liability of the seller to attend to such matters as the appropriation of the goods to the contract in accordance with the contractual quality and description where the object of the sale is unascertained goods, getting permission from the authorities for their export, and/or measuring them where it is necessary, and the expense thereby incurred.

Place of delivery

As in the French and English legal systems, the parties under the Iranian law are free to choose either expressly or by implication the place of delivery in their contract. In the absence of any stipulation as to the place of delivery in the contract, then the seller must deliver the goods at the place where a customary usage indicates if there is such a customary usage with regard to the place of delivery of the goods sold.

¹⁰ See Iranian Civil Code, Article 381. As to the provisions of English and French law, see pp. 6, 83, ante.

However, in contrast with the two former systems,¹¹ if the parties fail to stipulate the place where delivery is to take place and if there is no customary usage as to the place of delivery, then, under Article 375 of the Iranian Civil Code, the duty of delivery must be effected at the place where the contract was made, irrespective of whether the goods sold are specific or unascertained.¹² In comparison with English and French law, it appears that the provisions concerning the place of delivery under Article 375 of the Iranian Civil Code have attraction of simplicity. Since, unlike both of these systems, Article 375 does not differentiate between specific and unascertained goods in so far as the place of delivery is concerned and it might be considered easier for a trader to understand and act upon. Moreover, under Article 375 of the Iranian Code, the purchaser will not be faced such a problem as the one arising from the provisions of section 29(2) of the Act 1979¹³ with regard to the place of delivery of unascertained goods by the seller where the latter has more than one place of business which are possibly situated in different countries. Nonetheless, it seems inappropriate to follow the rule under Article 375 of the Iranian Code in an international sale particularly where the goods sold are specific.

Time of delivery under the Iranian law

Concerning the time of delivery, Article 341 of the Iranian Civil Code,¹⁴ like both English and French law, permits the parties concerned to anticipate in their contract the time for effecting delivery of the goods by the seller. Accordingly, where the contract requires the seller to deliver the goods before a fixed date, or within a stipulated period, he may perform the duty of delivery undertaken under the contract at any time before the fixed date or before the expiring of the period which has been

¹¹ As pointed out earlier the delivery under both of these systems is to be effected at the place where the article sold was at the time of the contract. See French Civil Code, Article 1609. With regard to English law, see the Sale of Goods Act 1979, Section 29(2).

¹² For the full provisions of Article 375 of the Iranian Civil Code, see Appendix IV.

¹³ The provisions of section 29(2) of the Act 1979 correspond with those of Articles 1609 and 1247(3) of the French Civil Code. For the problems concerning the place of delivery under these provisions, see pp. 11-12, ante.

¹⁴ For the full text of this Article, see Appendix IV.

provided in the contract. Nonetheless, where the parties agree on a specific date for delivery of the article sold, a question arises as to whether the seller can deliver the goods before the due date? To answer to this question, it is important to point out that, under Iranian law, the property in the goods passes to the buyer at the time of the conclusion of the contract of sale and afterwards the seller keeps the goods as a depositor for the buyer until the time of delivery. In accordance with the depository rule, on the one hand, the seller is entitled to recover from the buyer all the expenses which he has incurred for the keeping of the article sold, and, on the other hand, he is liable to deliver it to the buyer as its owner. Setting a time for delivery of the goods normally provides the seller with an opportunity to perform his duty undertaken under the contract, and, accordingly, it is an advantage given to him by the contract. Therefore, it could be said that, unlike the position in some other systems, such as English law,¹⁵ the seller, under Iranian law, is not in breach of the sale where he delivers the article sold before the time set by the parties for delivery falls due, since, in fact, by delivering the goods before the time for delivery, he waives the foregoing advantages granted to him under the contract. This rule will, of course, not apply where the buyer can show that he may also benefit from the time set in the contract for delivering of the goods or where there is a stipulation in the contract which prevents the seller from effecting delivery before the time of delivery. On the other hand, it must be observed that although the seller may in a normal case deliver the goods before the time of delivery provided in the contract, it does not grant the buyer a right to demand early delivery from the seller.

In contrast with French law,¹⁶ neither Iranian nor English law requires the buyer to send a notice to the seller asking him to deliver the goods within the time stipulated in the contract. This means that under the latter two systems, a mere failure by the seller to deliver the goods on the time for delivery is sufficient to render him liable vis-à-vis the buyer for breach of the contract. Nevertheless, in accordance with Article 226 of the Code, where under the contract the delivery of the goods is to be made upon the buyer's demand, then he has no right to claim damages

¹⁵ As to the position in English law, see for example, *Bowes v. Shand*, (1877) 2 App. Cas. 455.

from the seller for delay in performing of the duty of delivery, unless he can show that the latter has failed to deliver the goods at the time fixed by him (by the buyer) in conformity with the contractual terms.¹⁷

Unlike English law,¹⁸ the Iranian Civil Code contains no specific provision concerning the time when the goods are to be delivered by the seller in those cases where the parties also fail to agree on the time of delivery; nonetheless following Article 344 of the Iranian Civil Code, it could be deduced that in such instances the seller is bound to deliver the goods immediately after the conclusion of the sale. This is because, in accordance with the provisions of Article 344, the buyer must pay the price at once upon entering into the contract with the seller if the contract contains no stipulation as to the time of payment. And since, according to Article 377 of the Code, delivery of the goods sold and payment of their price are concurrent, the seller must deliver the goods immediately when the sale is made. Nevertheless, it would seem that these provisions (i.e., that the seller is bound to deliver the goods at once after making the sale where there is no stipulation as to the time of delivery in the contract) correspond with those of English law which require the seller, in such instances, to deliver the goods at a reasonable time after the parties entered into the contract since, there is no justification to force the seller to effect the duty of delivery within a shorter period than the one which, depending the type of the goods sold and its surrounding circumstances, is reasonably necessary for the fulfilment of this duty. The same principle seems to be applicable where the parties stipulate for delivery of the goods upon their production, i.e., the delivery is to take place within a reasonable time after the goods are produced. Similarly, where the parties agree the delivery to take place upon performance of some act by the purchaser, the seller would be in default only if he fails to deliver the goods within a reasonable time after completion of the stipulated act by the former.

¹⁶ See pp. 102-103, ante.

¹⁷ For the full text of Article 226 of the Iranian Civil Code, see Appendix IV.

See also N. Katoozian, *Moghadameie Hoghooghe Madani "Introduction to Civil Law"* (Tehran 3rd ed. 1995) at pp. 272-273.

¹⁸ See pp. 15-16, ante.

The fact that under the Iranian Code, delivery of the goods and payment of the price are concurrent conditions in a contract of sale, allows the seller to refuse to fulfil his duty in delivering the goods to the buyer where the latter fails to tender the price to him, unless there is a stipulation in the contract which permits the payment to be made at a latter date. Under this principle, where a single contract which requires multiple delivery is subject to payment of the price against a delivery which already has been made, the seller would not be liable for the delay in delivering of subsequent deliveries if he has not been paid for the preceding delivery. Nonetheless, although the Iranian law does not expressly provide as to whether or not non-payment of the price for one delivery justifies the seller in refusing to make subsequent deliveries to the buyer where the parties do not regard all deliveries to be inter-related, it could be induced, from Article 282 of the Civil Code,¹⁹ that, as in the French system, in such instances, the subsequent deliveries could not be delayed, provided that the buyer complies with the foregoing principle in rendering of the price with regard to the subsequent deliveries. For in accordance with the provisions of Article 282, the buyer may decide that his payment to the seller is in consideration of the subsequent deliveries rather than the one delivered before.

Furthermore, under Article 378 of the Iranian Code,²⁰ the seller who voluntarily delivers the article sold before receiving the price, may not reclaim it from the buyer, unless he provides that the latter has gone bankrupt and that he has retained the goods so delivered,²¹ or by cancellation of the transaction with the buyer when he is vested with such an option to do so.

In the event of the sale of a specified article, if the seller is unable to deliver or if despite his ability to deliver, he refuses to do so, then Article 374 of the Civil Code²² allows the purchaser himself to take the article into his possession at the expenses of

¹⁹ For the full text of this Article, see Appendix IV.

²⁰ For the full text of this Article, see Appendix IV.

²¹ See Iranian Civil Code, Article 380.

²² This Article provides:

“For taking possession of the goods, *no authorisation is necessary*. The buyer can take possession of the goods purchased *without any authorisation*.” [Italics added].

the seller, provided that he tenders payment of the price in conformity with the contractual terms. This would discharge the seller from the duty of delivery undertaken under the contract even though he has not given the buyer his authorisation for taking the possession of the goods.

The seller's duty to deliver the right quantity and the right to cure the defect in delivery

As in the other modern legal systems, the seller under the Iranian law is required to deliver the contractually agreed quantity. Article 384²³ of the Iranian Code allows the purchaser to cancel the sale if the quantity of the goods delivered is less than the agreed amount but if he chooses to accept the goods so delivered he must pay for them at the contract rate. The main difference between Iranian law and English law in respect of the above instances is that while under the former system the purchaser is permitted to cancel the deal with the seller for any shortfall in the quantity of the goods delivered, the latter system, by section 30(2A) of the Sale of Goods Act 1979 prevents him from rejecting the goods if the shortfall in the quantity is trivial. Obviously, the seller under the former approach would have to think twice before fixing the quantity of the goods for sale, since in the case of cancelling the sale for a shortfall in the quantity of the goods sold he would be liable as against the buyer for refunding of the purchase price as well as any costs of the contract and reasonable expenses incurred by the latter.²⁴ This would inevitably reduce litigation between the parties to a commercial contract through creating certainty among them. The danger under this approach is that the buyer may opt to misuse this rule as an excuse to cancel the whole transaction between the parties for a trivial shortfall in the quantity of the goods delivered, particularly, when the market price of the goods is falling and, therefore, he would like to escape from the bargain with the seller. Nonetheless, such a possibility is remote, since the courts have to consider any customary usage with respect to each case before applying the aforesaid rule in which they would

²³ For the full text of this Article, see Appendix IV.

normally prevent the purchaser from cancelling the sale where the shortfall in quantity of the goods is trivial. It seems, however, that the provisions of the English law concerning the cases where the shortfall in the quantity of the goods delivered is trivial are to be preferred over those of the Iranian law, since there is little or no justification in permitting the purchaser to cancel his transaction with the seller for an insignificant shortfall in the goods delivered, particularly, in the instances where the market price of them are falling. Such an approach is not only consistent with the Islamic principle of *lozoomé egraié gharardâdha* (the necessity of the performance of the contracts) but also justly prevents the seller from having to sustain the expenses of returning the goods delivered.

The other important difference between these two systems is that in contrast with English law, under which rejection of the goods by the purchaser for the breach of the obligation in delivering of no less than the contractually agreed quantity is treated as the seller's failure to deliver the goods sold, the cancellation of the sale by the buyer for the shortfall in quantity of the goods, under the Iranian law, does not have retroactive effect. In other words, under the latter system, the purchaser is considered as the owner of the goods upon making of the contract by the parties, and therefore, on the one hand, he is entitled to any fruit or profit which has been accrued to the goods within the period of making of the contract and its cancellation by him, and, on the other hand, he is liable to refund any expenses which the seller has sustained for their maintenance in that period.

Whether or not the seller can cure the defect in delivery by an additional delivery where the goods delivered are less than the amount which was stipulated in the contract particularly, if the time for delivery is not expired, is a question which has not been addressed by the legislators of the Iranian Civil Code. It seems that there is no justification for precluding the seller from completing the duty of delivery vis-à-vis the buyer undertaken under the contract by delivering the missing part at a later stage, even if the contractual time for delivery of the goods has passed provided that it does not cause the buyer unreasonable inconvenience. Nonetheless, it is worth

²⁴ See Iranian Civil Code, Article 386.

observing that this doctrine cannot be applied to the cases where, because of the shortfall in the quantity of the goods, the purchaser has cancelled the deal, since after the cancellation, the transaction between the parties is considered to be dead. There is, however, a question as to whether cancellation of the transaction for the shortfall in quantity is valid before the expiration of the time for delivery under the contract. It may be argued that the answer to this question is negative since, unlike some other options, such as the Option of Defect which under Article 435 of the Civil Code the buyer must exercise the option by cancelling the contract immediately after discovering of the defects in the goods, there is no similar provisions to require the buyer to cancel the contract between the parties immediately when he discovers that the quantity of the goods delivered is less than the amount agreed by the parties and therefore, he cannot cancel the deal before the time of delivery is passed. But this argument is not sound for, lack of a provision to require the buyer to cancel the deal immediately after it become known to him that the quantity of the goods delivered is less than the contractual amount fixed by the parties, does not mean that he is not entitled to cancel the transaction with the seller at anytime after discovering of the shortfall in quantity of the goods delivered to him. Moreover, in accordance with the provisions of Article 435, the buyer will lose his option to cancel the sale for the defect in the goods if he fails to comply with the requirement in exercising the option at once, while lack of similar provisions in respect of a shortfall in quantity allows the buyer to cancel the transaction irrespective whether the time for delivery has been passed or not. It is submitted, however, that depriving the seller of the right to cure a defect in delivery by handing over the difference in quantity between the amount of the goods which has been actually delivered and the amount which was fixed by the parties in the contract, is unjust and favours the buyer. In other words, the law should be amended so as to prevent the buyer cancelling the sale for the shortage in quantity of the goods delivered before the expiration of the time of delivery in the contract, thereby to allowing the seller to cure the defect by delivering of the shortfall in quantity at any time between the time of defective delivery and the contractual time for delivery.

In contrast with English law, (under which in the absence of an agreement to the contrary by the parties, the seller is precluded by section 31(1) of the Act 1979²⁵ from delivering the goods in more than one load, where the buyer chooses not to accept the goods so delivered), the Iranian Civil Code does not states whether the buyer may reject the goods delivered by instalments where there is no stipulation in the contract to allow the seller to deliver the goods by instalments within the period fixed in the contract. Nonetheless, according to the general provisions applicable to every contract under Article 277 of the Iranian Civil Code:

“The obligor cannot force the obligee to accept only a proportion of the object of obligation undertaken under the contract, but the court may depending on the financial status of the obligee, grant a period of grace or arrange for delivery by instalment.”

It appears, at the first glance, that the provisions of this Article prevent the seller from delivering the goods by instalments, but such an interpretation of Article 277 is improper. In fact, this Article empowers the court to order the seller to cure the defect in delivery by granting him a period of grace to deliver the shortfall in the amount of the goods at a later stage or by instructing him to deliver the shortfall by instalment. Accordingly, as pointed out in the previous paragraph, there is no reasonable ground to prevent the seller from delivering of the goods in more than one load in so far as delivery takes place before the expiration of the period for delivery stipulated in the contract. This means that the seller, under the Iranian legal system, would not be held liable for breach of the contractual duty to deliver the goods sold to the buyer where he delivers the shortfall in the quantity at later stages before the expiration of the period set out by the parties for delivery, even if the buyer declines to accept the goods so delivered. Even when the time for delivery of the goods has passed, the court may, depending on the surrounding circumstances of each case, still decide to allow the seller to deliver the goods by instalment within an additional specified period, in which case the buyer is bound to accept the goods so delivered

²⁵ For the full text of this Article, see Appendix IV.

Excess in quantity of the goods delivered

Where the amount of the goods delivered is larger than the agreed quantity under the contract, then, under the last part of Article 384 of the Iranian Code, the buyer is required to accept that part which should have been delivered to him and the excess belongs to the seller. In other words, as pointed out earlier elsewhere, unlike other legal systems under consideration,²⁶ in such instances, the Iranian system rightly does not grant the purchaser an option to cancel the deal with the seller or to accept the whole goods delivered to him and to pay an additional price for the excess in quantity at the contract rate.²⁷ For it seems irrational to impose on the seller liability for breaching of the duty to deliver undertaken under the contract merely because the amount of the goods delivered is larger than what was agreed in the contract by the parties concerned. On the other hand, there is no justification why the buyer should be forced either to accept all the goods delivered by the seller and to pay an additional price for the excess in the quantity or disavow the contract with the latter as required by French law,²⁸ in those cases, for example, where he (the buyer) can afford to pay only for the same quantity of the goods as provided in the contract or where it is no use to him to have a quantity of goods larger than that which he has contracted to purchase.²⁹

Of course the arguments considered above apply only to the cases where the excess in the quantity can be separated safely from what was contracted to be sold without causing any damage to the goods delivered. Otherwise, if the article sold is one that cannot be divided without inflicting damage to it, such as a rug or a carpet, and at the time of delivery it transpires that it is smaller or larger in size than what was agreed by the parties in the contract, then, according to Article 385 of the Iranian

²⁶ As to the provisions of US law in this respect, for example, see pp. 51-52, ante.

²⁷ Of course, the purchaser may enter into a new agreement with the seller to accept the excessive part of the goods delivered to him in which case he has to furnish the latter with an additional price in conformity with the terms of the new agreement.

²⁸ See French Civil Code, Article 1619.

²⁹ This problem in Britain has been obviated by section 30(2) of the 1979 Act under which where the seller delivers a quantity of goods larger than he contracted to sell, the buyer may choose to accept the goods included in the contract and reject the rest.

Code, the buyer in the former case and the seller in the latter one may cancel the transaction between the parties. It could be argued that in such instances the main purpose of the parties in dealing with each other is the sale of an identified article with a fixed size in consideration of the specified price, therefore, if the buyer on delivery discovers that the article is shorter than the contractual size, he is given an option to cancel the sale as he should not be forced to pay the contractual price in the event of a shortage in the size of the article delivered. Nonetheless, where the purchaser chooses to accept the article so delivered he must pay the price specified by the contract. On the other hand, if in such instances the article, at the time of delivery, is found to be larger than the size provided in the contract, then the law allows the seller rather than the buyer to cancel the transaction between the parties and to recover from the buyer the article so delivered. Perhaps the provisions in granting an option to the seller for cancelling of the deal with the buyer are based on the assumption that the seller is the only party who may suffer from the deal as the price provided by the contract is mostly unsatisfactory as against the article delivered if it is discovered to be larger than the size fixed by the parties. Such an assumption, however, is not always correct and there are many instances in which the deal may cause more damage to the purchaser than to the seller where the article delivered is larger than the contractual size. As an example, suppose that a buyer enters into a contract to purchase 1000 hand knitted Kashan rugs to be used by his customers in newly built flats with specified sizes. Suppose further that at the time of delivery, the rugs are found to be larger than the sizes fixed in the contract in which case the customers would surely decline to accept them from the buyer as they are not suitable to be used in the aforesaid flats. This means that the purchaser in such instances would, illogically, have to face heavy losses if the seller prefers not to cancel the sale. On the contrary, in those instances where the seller rather than the buyer suffers a loss as a result of delivery of the article which is larger in size than what was contracted to sell, he may rely on the Article 416 to cancel the transaction with the buyer if there is evidence to demonstrate that the contractual price of the article delivered is incommensurate with its market price at the time of the transaction. Therefore, the provision of Article 385 of the Code in granting of an

option to the seller to cancel the deal between the parties where the article delivered is larger than what was fixed in the contract is surplus if the purpose of its enactment has been to protect the seller from enduring a loss in the foregoing instances for this purpose can also be achieved through Article 416. If the seller does not endure any loss as a result of delivering an article which is larger in size than what he has contracted to sell, the discretionary option under Article 385 enabling him to cancel the sale at his will would be unreasonable, particularly since he is the most blameworthy person in failing to provide the exact size of the article at the time of the sale.³⁰ It seems, therefore, appropriate to amend the law by repealing the seller's option to cancel the sale under Article 385 and replacing it with an option to the purchaser so as to enable the latter to cancel the sale where he can show that delivery of the article which is larger in size than what was provided by the parties, has caused him to suffer a loss.³¹

The buyer's remedies for the seller's default in fulfilling of the duty of delivery

As in French law, the seller, in accordance with Iranian law, is in breach of the duty to deliver under the contract between the parties where, despite his ability to deliver the goods in conformity with the contractual terms he declines to do so. Similarly, the seller is responsible for breach of the sale for failing to deliver the goods if his inability to perform delivery is caused by his own fault, neglect, or mistake. Thus he will be held liable as against the buyer when he fails to make delivery to the latter, or when, in delivering the goods, he does not observe the contractual requirements concerning quantity or quality of goods sold, the place of their delivery and/or the time at which they had to be delivered.

³⁰ The fact that the seller is the most blameworthy person for his failure to notice the exact size of the article at the time when he enters into the contract with the buyer has been impliedly recognised by the provisions of Article 386 of the Iranian Code under which the seller, in the event of cancellation of the deal, is required to refund "over and above the price any costs of the contract and reasonable expenses incurred by the buyer."

³¹ Under English law, the buyer may, in such instances, sue the seller for failing to deliver goods in conformity with the contractual description under section 13(1) of the Act 1979. See pp. 186-192, post.

Whether the failure to deliver is caused by the seller's fault or by his neglect is immaterial as regards the amount of his liability for non-delivery. The only difference between these instances is that while in the latter case an exemption clause in the contract may discharge the seller from the liability for non-performance of the duty of delivery, it has no effect whatsoever on his liability against the buyer where he intentionally refuses to deliver the goods sold. However, the seller would be exempted from any liability as against the buyer for failing to deliver the goods where his inability to deliver is caused by some occurrence other than the seller's own act or fault. For example, where an earthquake has destroyed the article sold, or where because of a strike in the port of shipment the delivery did not take place at due date, the seller is not answerable for breach of the duty of delivery (*force majeure*). The main difference between Iranian and English law is that in the case of *force majeure* the contractual relation between the parties would come to end under the latter system and the seller would have no liability whatsoever against the buyer thereafter, whereas the relief granted to the seller, in such instances in accordance with the former system, is not permanent and he has to deliver the goods in conformity with the contract once the condition of *force majeure* is removed.

In the case of breach of the duty to deliver the goods by the seller, various remedies are available to the buyer under Iranian law which dependent on the type of the breach and the surrounding circumstances of each case could be invoked by him. These remedies are dealt in the following section.

Non-delivery

The buyer's right to retain the price

As in other modern legal systems,³² payment of the price by the buyer under Iranian law is concurrent with the delivery of the goods by the seller. This rule entitles the buyer to refrain from paying the price where the seller fails to deliver the goods in

accordance with the contract. This remedy which is also available to the buyer for delay in delivery where the time of delivery is of the essence of the contract, is sounded on the doctrine of cause. According to this doctrine, the obligations of each party in a synallagmatic contract, such as a contract of sale are the cause of the obligations of the other party, and therefore, non-performance of the contract in delivering of the goods by the seller justifies the non-payment of the price by the buyer.³³ But the buyer cannot avail himself of this remedy where the sale requires him to pay the price before receiving of the goods purchased or where he voluntarily makes payment to the seller before delivery of the goods.

Nevertheless, this remedy is temporary and provisional which provides the aggrieved buyer with a means of putting pressure on the seller to deliver the goods as required by the contract without referring the case to the court. This means that the remedy requires the buyer to be prepared to make payment to the seller upon delivery of the goods by the latter. However, this remedy does not prevent the buyer from having recourse to the other remedies which are available to him under Iranian law. Accordingly, the buyer may avoid the sale and sue the seller for damages for non-delivery in cases where the time for delivery, which is of the essence of the contract between the parties, has been expired, or where, because of the seller's default, he is no longer able to deliver the goods sold.

Specific performance

In contrast with English law, under which the prime remedy of the buyer in the event of non-delivery or non-punctual delivery is to maintain an action against the seller for damages for the breach of the duty of delivery undertaken under the contract, in Iranian law the buyer, in such instances, may affirm the contract and demand due performance thereunder,³⁴ unless the punctual delivery of the goods is essential in the

³² As to the provisions of English law, for example, see p. 17, ante.

³³ In accordance with this principle, the buyer may recover the price (but not any damage) from the seller where the latter cannot fulfil the duty of delivery, because of some outside cause for which he could not be held responsible. See Katoozian, *supra*, note 17, pp. 238-24

³⁴ See Iranian Civil Code, Article 376.

contract between the parties in which case he may avoid the sale and recover from the seller the price as well as the damage which he has sustained in dealing with the latter. However, In contrast with English law, no definite rule has been laid down as to when delivery time is of essence of a contract, unless the contract itself provides for a right of avoidance of the contract upon the seller's failure to deliver the goods at the time set by the parties in the contract. The question is one of fact to be decided upon the particular circumstances of each case. The test is whether, from the nature of the article sold, the position of the parties, the terms of the contract, and other circumstances surrounding the deal, it can be inferred that the time of delivery stipulated in the contract was regarded as vital by the parties; if so, the seller's default in timeous delivery of the goods sold entitles the buyer to avoid the transaction; if not, he may merely sue the seller for the damage caused by the delay in performing the duty of delivery. For example, where the parties enter into a contract for selling special chocolates to be served at the buyer's birthday party on a specified date, then non-punctual delivery of the chocolates sold gives rise to a right of avoidance of the transaction by the buyer. In fact, unlike Anglo-US tradition, non-delivery of the goods under Iranian law does not entitle the buyer to avoid the sale in so far as the time of delivery is not essential and there is the possibility of enforcing the contract by compelling the seller to deliver the goods sold. For in accordance with the principle of necessity of performance of contracts (*lozoomé egraié gharardâdha*) applicable in Iranian law, the parties are essentially required to enforce the contract in so far as possible, once it is made by them. This means that the buyer may invoke the remedies other than specific performance only if there is no possibility of enforcing the sale by requiring the seller to deliver the goods.

In contrast with French law,³⁵ in the case of the seller's refusal to deliver the goods despite his ability to do so, the buyer, in accordance to Article 374 of the Iranian Code, may take the goods into his possession, if he can, and, if not, ask the court to enforce the sale by instructing the seller to deliver them.³⁶

³⁵ For the position under French law, see pp. 102-103, ante.

³⁶ See Iranian Civil Code, Article 376.

Under Article 387 of the Iranian Civil Code, where the goods cannot be delivered because they have perished without the fault or negligence of the seller, then the sale will be cancelled and the seller is bound to restore the consideration to the buyer, but the latter is not entitled to recover any damage for the seller's failure to fulfil the duty of delivery, since, damages are recoverable only in the cases where the failure is caused by the seller's default. The same rule applies if some occurrence other than the seller's own act or fault hampers his ability to deliver. Nevertheless, if, in the latter instances, the obstruction in delivering of the goods is removed later, the buyer may demand for the enforcement the delivery even if the time set by the parties for the delivery has passed, provided of course that he has not already cancelled the transaction with the seller.³⁷

Where the object of the sale is not severable, then its partial delivery by the seller would not avail him in reducing his liability vis-à-vis the buyer for breach of the duty to deliver undertaken under the transaction with the latter. In such instances, the buyer may claim damage from the seller for a delay in delivery where it is possible to enforce the contract by demanding the latter to deliver the rest of the thing sold. Where the seller cannot deliver the shortfall in the amount of the goods sold, the buyer may cancel the transaction and apply for damages for non-delivery. The same rules apply where the seller has been unable to deliver all or part of the goods sold on time, due to his own fault or negligence. That is, the buyer may claim damages for a delay in delivery where the seller's inability to deliver is temporary, and, therefore, the buyer can demand that the seller deliver when the cause of this inability is obviated, but the buyer may cancel the sale and sue the seller for damages where the seller's inability to deliver is permanent, or where, despite a court order to deliver the goods sold, the seller refuses to do so. However, if the seller's inability to deliver the goods, or part of them, is due to the buyer's action, the latter will have no

³⁷ The buyer may not cancel the sale where the obstruction is temporary, which may be obviated before the time of delivery. It seems that the same rule applies in the above instances even if the time for performance of delivery has lapsed, provided, of course, that the time for delivery is not the essence of the sale.

claim against the seller for non-delivery, although he remains responsible to pay the price in conformity with the contractual terms.³⁸

If it is proved that the seller was unable to deliver the goods at the time of delivery, then the transaction between the parties is void *ab initio*, in which case the buyer can recover the price paid to the seller, but he has no right to claim any damage for non-delivery or delay in delivery of the object of the transaction. If, in the foregoing instances, the seller could deliver only part of the goods sold, then the sale is valid for that part but not for the remainder.³⁹ This may occur only where the goods sold are severable, otherwise, like the foregoing instances, the transaction between the parties is invalid and thereupon the purchaser is entitled to claim back the price paid to the seller.⁴⁰

As pointed out earlier, unless otherwise agreed by the parties in the contract, the seller's refusal to deliver would, unlike the French and the English systems, not give the buyer a right to cancel the goods where there is the possibility of enforcing the contract of sale against the seller by requiring him to deliver the article sold. In such instances, if the buyer cannot take the goods purchased into his possession, the enforcement of the contract may take place only through the court, or, if the contract is contained in a formal document and the legality of its enforcement is not disputed by the parties, through the Registration Office or the legal office through which the contractual document is made.⁴¹

In the case of the sale of a specified article, for example, the buyer may apply to any of these legal public entities to issue an order for specific performance of the obligation of delivery. The order must be implemented through the court's officer who will dispossess the seller of the property sold and deliver it to the purchaser. Where the seller hides the goods sold or hinders their delivery to the buyer, the court, like under French law, may put economic pressure on him to break his resistance in

³⁸ See Iranian Civil Code, Article 389.

³⁹ Iranian Civil Code, Article 372.

⁴⁰ Even where the sale between the parties is severable and the seller can deliver only a portion of the goods sold whilst the remaining portion has perished through no fault of his, the buyer may, under the "option of sales unfulfilled in part", cancel the whole deal between the parties and thereby claim back the price paid to the seller. See Iranian Civil Code, Article 441.

⁴¹ Katoozian, *op. cit. supra.*, note 17, p. 259.

executing the court decree concerning his duty of delivery under the contract.⁴² The court normally issues an order requiring the seller to pay a specified amount of money for each day's delay in complying with its decree to deliver the goods sold. More delay in implementing the obligation of delivery by the seller will result in his paying of more money to the buyer. Nevertheless, it appears from the provisions of Article 729 of the Iranian Law of Civil Procedure that the court may not review the amount payable by the seller for a delay in executing the court's decision requiring him to deliver the goods within a fixed period. In other words, under Iranian law, there is no provision corresponding with the French rule of *astreinte provisionale* whereby the court may reserve to itself the power to review the amount, having regard to the seller's resisting or opposing making delivery under the contract. However, unlike the criminal law, the provisions of which are to be construed narrowly, one may interpret the regulations of this article so broadly as to empower the court to review the amount payable to the buyer for the seller's delay in delivery in conformity with the court's decision (*astreinte provisoire*) when it is necessary to do so.

As pointed out earlier, a court's order requiring the seller to pay a fixed amount of money to the buyer for each day's delay in delivery of the goods, in accordance with the court's decision, is a means used against the seller to overcome his resistance to perform his obligations undertaken under the contract of sale, and, therefore, it differs from the requirement under which the seller is bound to redress any damages which the delay caused to the buyer. For in the former case, the court, in defining the amount, will have to regard the seller's conduct and the effect which the fine is likely to have on him in agreeing to perform the sale with the buyer, while in the latter case, reimbursement of the damages suffered by the buyer is the only factor which is to be taken into account in making the decision against the seller.⁴³ Accordingly, there may be instances in which the seller is required to make a payment of some amount to the buyer for refusing to act upon the court's decree in

⁴² See the Iranian Law of Civil Procedure, Article 729.

⁴³ Nonetheless, one must distinguish between the court's order instructing the seller to pay a fixed sum for each day's delay in performing the contract by delivering the goods sold and its decision to

delivering the goods within the period fixed in the decree, though the buyer sustains no loss as a result of the breach. On the other hand, there is possibility that the seller will be required to redress the damages which the buyer has suffered as a consequence of the seller's breach of his duty to deliver, whilst if it is impossible to perform the contract by delivering the goods at a later stage, he will be exempted from making a payment for a delay in delivery.

It is to be noted that, in contrast with French law, the court, under the Iranian system, may issue an order against the seller to pay a sum to the buyer for a delay in delivery only if the following conditions are met:

- 1) The case has been tried by the court and the seller is found to be in breach of the contract.⁴⁴
- 2) The aggrieved buyer has demanded the court issue a verdict instructing the seller to pay a sum to him for the delay in performance of the sale between the parties.⁴⁵
- 3) Only the seller can perform the delivery. Accordingly in the case of the sale of an unspecified article the court will not order the seller to pay any sum for delay in delivery rather it may issue an order authorising the buyer to buy a replacement article, at the expense of the seller if the direct enforcement of the contract through delivery, of the goods by the seller for any reason is not possible.
- 4) It is within the seller's ability to execute the court's decision by delivering of the goods to the buyer in accordance to the contract. Therefore, the court cannot order the seller to pay any sum for delay to comply with the court's decision to deliver where, because of his default, the goods have perished or where the time of delivery, which was the essence of the contract between the parties, has passed.
- 5) The court cannot directly enforce the sale through delivery of the goods to the buyer by its officer. This means that the seller will be condemned to pay a sum for delay only if he resists in executing the court's decision requiring him to deliver the object of the sale within the period fixed in the decision.⁴⁶

condemn him to pay cash fine .

⁴⁴ See the Iranian Law of Civil Procedure, Article 729.

⁴⁵ See the Iranian Law of Civil Procedure, Article 729.

Cancellation or rescission of the contract

In contrast with French and Anglo-US law,⁴⁷ the general principle of irrevocability of contracts (*lozoomé egraié gharardâdha*) under Iranian law prevents the buyer from cancelling the sale for mere non-delivery of the goods by the seller, unless he can show that there is no possibility of enforcing the contract between the parties. Accordingly, the buyer may cancel the sale and claim back the price paid to the seller where, as the result of an incident which is not caused by the seller's fault or negligence, the goods are destroyed before being delivered to the former.⁴⁸ Nevertheless, the availability of this remedy to the buyer where the destruction of the goods are attributable to the seller's own default, has been the subject matter of long dispute among the authorities on the civil law. Opponents of this remedy argue that cancellation of a transaction by the buyer is an exception to the general principle of irrevocability of contracts (*lozoomé egraié gharardâdha*) which can be exercised only in the cases where the Civil Code has expressly authorised him to do so.⁴⁹ Accordingly, in such instances, the buyer, in accordance with Articles 328 and 331 of the Civil Code, may only ask the seller to deliver an article similar to the one purchased, or if no such a similar article is available, to refund to him its market price. This is because the property in the article sold passes to the buyer at the time when the parties make the contract and thereafter the seller is considered as custodian of the article for the buyer until its delivery to him. However, it is to be noted that destruction of the goods is one of the cases in which the duty of delivery cannot be fulfilled, and it thereby gives the buyer a right to cancel the sale. This means that the seller's liability for non-delivery of the goods, in such instances, would not extinguish the buyer's right to cancel the sale between the parties. This approach, which has been supported by the majority of the Islamic scholars, is another aspect of

⁴⁶ See the Iranian Law of Execution of Decisions, Article 47 and its Note.

⁴⁷ As to the position under English law, see pp. 22-25, ante.

⁴⁸ See the Iranian Civil Code, Article 387.

⁴⁹ See Said Hassan Emami, *Hoghooghe Madani "Civil Law"*, vol. 1 (8th ed. 1989, Tehran) at p. 464. This view has been also supported by some of the leading Islamic scholars, such as Shikh Mohammad Hassan Najafi, *Javaher-ol-Kalam*, vol. 23 pp. 23, 84, 157-158; Molla Ahmad Naraghi, *Mostanad*, p.

bilateral contract such as a sale in which the obligations of one of the parties are the cause of the obligations by the other. Accordingly, the buyer, in such instances, will have an option to cancel the sale and to recover the price from the seller if he has already made payment to him or pay the contractual price and sue the latter for the replacement of goods destroyed with equivalent ones. This argument may well apply to the cases where a third party is responsible for the destruction of the article sold in which case the buyer would be entitled to cancel the transaction with the seller and claim back the price paid to him or as the owner sue the third party for the replacement of the article with a similar one if it replaceable and if not for its market price.

Where the seller refuses to perform his duty under the contract despite his ability to do so, and the pressures exercised on him through the court fail to overcome his resistance in delivering the goods sold, the buyer, in contrast with both French and Anglo-US law, may, as a last resort, cancel the sale with the seller and sue him for the damage caused by his breach, if the goods sold are specified by the parties concerned.⁵⁰ Nonetheless, if, in the above instance the goods are not specified in the contract and it is possible for the buyer to purchase replacement goods, the buyer cannot cancel the sale but he may ask the court to authorise him to purchase the replacement at the seller's expense.

Whether cancellation of the contract is to be made through the court

The Iranian Civil Code does not provide whether the buyer needs to apply to the court to cancel the sale for non-delivery in the instances where he is allowed to do so. Nonetheless, it seems that the buyer may cancel the transaction between the parties without referring the case to the court where, because of the destruction of the goods or any other reason, the seller will not be able to perform his duty under the transaction. However, where there is possibility for the seller to deliver the goods but he refuses to do so, the cancellation of the transaction is to take place through the

court after it is established that the seller will not perform his duty vis-à-vis the buyer in accordance with the transaction. For otherwise the buyer cannot claim damages from the seller for non-delivery

The buyer's duty to mitigate the damage under Iranian law

Like their French equivalents, the Iranian provisions concerning the seller's breaching of his duty to deliver goods entail no liability whatsoever against the buyer to mitigate the damage caused by the by the breach. In other words, unlike English law, under these systems the consequence of the seller's breach is not to impose a further duty on the innocent buyer by requiring him to mitigate the damages which may arise from the breach. It is the duty of the breaching seller to take appropriate action in order to prevent or, to reduce the damage which, the breach may cause to the buyer and, in the event of his failure, to the buyer's loss resulted from the breach. The advantage of this approach over that of the common law systems is that it discourages the seller from wilful breach of the contract, and, as such, it is consistent with the Iranian general principle of necessity to perform the contracts (*lozoomé egraié gharardâdha*) which requires the parties to maintain the contract of sale by fulfilment of their respective duties in so far it is possible to do so. For this reason, the seller who knows that he will be held liable for both incidental and consequential damages caused by his breach may have to think twice before breaching of the contract.

Delay in delivery

As has been indicated above, where the seller refuses to fulfil his duties under the contract, the buyer may ask a public official to instruct the seller to do so. If the seller accepts such an instruction to deliver the goods he must also redress the damage caused to the buyer by the delay. In other words, the seller's delay in delivering the

⁵⁰ Katoozian, *op. cit. supra.*, note 17, at p. 254.

goods at the time provided by the parties is but a temporary non-performance of the contract by him which gives rise to his responsibility for the loss sustained by the buyer as a consequence of the delay.

Damages for delay are recoverable only if the seller can still make delivery to the buyer after the elapse of the time fixed by the parties for performance of the contract. This means that the seller will have no liability to pay damages for delay if, for any reason, it is no longer possible for him to deliver the goods to the buyer unless the buyer can show that the seller's inability in delivering of the goods caused by his own default. Even where it is within the seller's ability to deliver but he declines to do so, despite the legal pressure exercised on him through an authorised public body, the court would reject a claim for damages for a delay in delivery by the buyer. Similarly, the seller is not liable for any loss caused to the buyer where, under the contract, the time of delivery is to be determined by the latter and he fails to act upon it. The same rule applies to the cases where the time for delivery is fixed by the parties but in accordance with the contractual terms or under a common usage the buyer is required to serve a notice for delivery to the seller but he fails to do so.

Damages

As in French law,⁵¹ the seller's default delivering the goods in accordance with the contractual terms gives to the buyer a right to claim damages from the former for the default. This means that whatever remedies are granted to the buyer, he may also claim damages caused by the seller's breach. In fact, damages may either constitute a substitution for delivery of the goods sold or may complement the remedy of specific performance.

Article 221 of the Iranian Civil Code generally states:

"If a party undertakes to perform or to abstain from any act, but fails to carry out his undertaking he will be responsible to pay compensation to the other party provided that the parties have expressly stipulated for the compensation for such losses in the contract or that it is understood in the contract in accordance to the

⁵¹ See pp. 100-102, ante.

customary law or that such compensation is by law regarded as guaranteed.”

At a first glance, one may think that, under these provisions, the buyer, in some instances, is not entitled to bring an action against the seller for compensation for failing to deliver the goods sold if there is no customary law or no stipulation to this effect in the contract. However, such interpretation of the Article is incorrect, since, as Professor Katoozian observes, it is almost impossible to imagine an instance in which the party in breach is not required by the customary law to pay compensation to the aggrieved party for the losses caused by the breach.⁵² In other words, irrespective of whether or not the parties have agreed on any stipulation as to the compensation at the time of the sale, a seller who is in breach of a contract of sale is liable to redress the damage caused to the buyer by his breach.

Under Article 728 of the Iranian Law of Civil Procedure, the buyer has to prove that he has suffered a loss as a result of the seller's breach before he could recover damages from the latter,⁵³ unless the parties stipulate in the contract that the seller is to pay to the buyer a fixed amount as damage for the delay in delivery or non-delivery of the goods sold.⁵⁴ In the latter instances, the seller is bound to pay to the buyer the stipulated amount in the contract, even if the loss sustained by the buyer, as a consequence of the breach, does not reach that amount. On the other hand, if the damages suffered by the buyer for the breach of the duty of delivery is larger than what has been stipulated by the parties concerned, he cannot recover the excess from the seller.⁵⁵

As in French law,⁵⁶ the compensation granted to the buyer under Article 728 of the Iranian law of Civil Procedure⁵⁷ for breach of the duty of delivery should cover both his actual loss caused by the breach and the loss of gain which he has been deprived of, provided that both of these losses directly have resulted from the non-fulfilment of the duty of delivery in accordance with the contractual terms.⁵⁸ In other

⁵² See Katoozian, *op. cit. supra.*, note 17, p. 289.

⁵³ For the full text of this Article, see Appendix IV.

⁵⁴ See the Iranian Civil Code, Article 230.

⁵⁵ *Ibid.*

⁵⁶ See pp. 100-102, ante.

⁵⁷ For the full text of this Article, see Appendix IV.

⁵⁸ See Article 728 of the Iranian Law Civil Procedure.

words, the damages sustained by the buyer are not recoverable from the seller if they are not caused directly by the seller's breach of the duty of delivery. As an example, where because of the seller's failure to deliver the barley sold under the contract the court authorises the buyer to purchase their replacement to feed his cattle and it is found that the replacement goods were poisonous and, therefore, caused the buyer's cattle to die, the latter may not demand compensation for the loss resulting from the death of the cattle, since the loss has not directly resulted from the breach even though the buyer would not have suffered this loss if the seller had fulfilled his obligations in accordance with the contract.⁵⁹

Further, as Professor Katoozian points out, the seller's liability concerning his breach in delivering of the goods sold is limited to the damages which customarily are to be reimbursed by him.⁶⁰ In other words, the seller must compensate only those losses which are customarily foreseeable to the parties at the time of the sale.⁶¹

In contrast with French law,⁶² there is no provision in the Iranian Civil Code to distinguish between the cases where the seller's failure to perform his obligation of delivery of the goods is due to his bad faith and the instances where the failure is the result of gross negligence on his part, and, therefore, the seller in either of these instances is liable to compensate any damage which has been directly caused by non-delivery to the buyer, provided that it is foreseeable to the parties at the time when they entered into the contract of sale. Nevertheless, it seems that in the former instances the buyer may also be able to recover other damages, even if they were unforeseeable at the time of the contract by taking a delictual action against the seller, provided that these damages are directly caused by the seller's breach. It must, moreover, be pointed out that the seller may be relieved from the liability by an exemption clause in the contract if his breach in performing of the duty of delivery is caused by his gross negligence, whilst such a clause has no effect whatsoever where he declines to deliver the goods in bad faith.

⁵⁹ It could be argued that in this instance the buyer's own negligence in purchasing the replacement is the main cause of the loss of his chattels and, therefore, he has no right to claim compensation from the seller for the loss.

⁶⁰ Katoozian, *op. cit. supra*, note 17, at p. 292.

⁶¹ *Ibid.*

Introduction

The purpose of this chapter is to provide a comprehensive overview of the various aspects of the law of evidence, including the rules of evidence, the burden of proof, and the standards of proof. The chapter is divided into several sections, each dealing with a different aspect of the law of evidence. The first section discusses the general principles of the law of evidence, including the relevance of evidence and the admissibility of evidence. The second section discusses the burden of proof, including the standard of proof and the allocation of the burden of proof. The third section discusses the standards of proof, including the standard of proof in civil cases and the standard of proof in criminal cases. The fourth section discusses the rules of evidence, including the rules of evidence in civil cases and the rules of evidence in criminal cases. The fifth section discusses the various aspects of the law of evidence, including the rules of evidence, the burden of proof, and the standards of proof.

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The Burden of Proof in Civil Cases (p. 101)

The burden of proof in civil cases is the obligation of a party to prove its case by a preponderance of the evidence. This standard of proof is generally applied in civil cases, except in cases involving fraud, where the standard of proof is clear and convincing evidence.

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⁶² See p. 101, ante.

Chapter 5

Introduction

The ever increasing number of international transactions resulting from the recent remarkable developments in technology, the contrast between different legal systems (some of which have been examined in this work) and the confusions and uncertainties arising from the complexity of the law of sale for the parties in an international sale under these systems, led to adoption of the Vienna Convention on International Sale of Goods 1980 by the representatives of various national legal systems. The provisions of the Convention concerning the seller's duty to deliver are the subject matter of discussion in this chapter, the aim of which is to determine whether and to what extent these provisions may obviate the aforesaid problems referred to in earlier chapters between the parties concerned.

The Obligation to Deliver under the Vienna Convention on International Sale of Goods (CISG)

Article 30 of the CISG defines a seller's obligations under a contract of a sale as follows:

“The seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this convention.”

This Article sounds very much like the corresponding Article 18 of the ULIS, which established that the seller “shall effect delivery of the goods, hand over any documents relating thereto and transfer the property in the goods, as required by the contract and the present law.” But the two formulations-“the seller must deliver the goods” (Article 30 CISG) and “the seller shall effect delivery of the goods” (Article 18 ULIS)- are so to speak, codificatory worlds apart. The drafters of ULIS attempted to encode into the one concept of *délivrance* a whole range of issues, such as

performance and risk of loss (Article 71 ULIS) and limitation of the seller's obligations to goods identified to the contract in the case of a sale of unascertained goods. In other words, all the elements of due performance were gathered in Article 18 of ULIS. In a definition of delivery, Article 19(1) prescribed that delivery (French *délivrance*) consisted of handing over the goods which conformed to the contract. This means that there was no *délivrance* and, therefore, no risk passed to the buyer where defective goods had been delivered to him even though he had used or resold them to a third party. This result proved untenable in various situations. For example, it was artificial to say that no delivery had taken place when the goods were accepted by the buyer, when he could not reject the goods because of his failure to give timely notice of the defects, when he had to accept the goods since the defects were not fundamental as required by ULIS, or when the defects in the goods were duly cured by the seller. This led the drafters of ULIS to make exceptions to the rule in such instances and to give *délivrance* retroactive effect to the moment when the goods were handed over to the first carrier or to the buyer. In an effort to avoid the foregoing problems UNCITRAL abandoned this highly abstract and ill-defined concept (Article 19 ULIS) at an early stage,¹ and the CISG understands "delivery" in a purely descriptive sense. Accordingly, Article 30 of the CISG states the essence of the seller's obligations are to deliver the goods, hand over any documents and transfer the property. But, unlike ULIS, the statement of the seller's obligation under this article does not include delivery of goods "in conformity with the contract." Likewise, whilst Articles 31 to 34 describe the acts which the seller must do in order to fulfil his obligations under Article 30, the duty to deliver goods which "conform with the contract" is not included. In other words, the seller under the CISG is considered to have fulfilled his obligation to deliver even if the goods delivered do not correspond to the description required by the contract. Nonetheless, the seller who delivers non-conforming goods is in breach of the contract that may trigger the buyer's remedies laid down in Article 45 and following. The question arises as to

¹ J. Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* (1982) pp. 238-239 . 210.

whether the obligation to deliver is performed where the goods placed at the buyer's disposal or handed over to the first carrier are entirely different from the ones ordered by the buyer. It might be argued that irrespective of whether or not the placing of such goods at the buyer's disposal or handing them over to the first carrier constitutes delivery, the seller is in breach of the contract and in either case he is liable to the buyer under Article 45 and following and, therefore, there is no use in distinguishing in between the delivery of merely non-conforming goods and delivery of entirely different goods from the ones described in the contract between the parties. However, as Professor Schlechtriem observed, the distinction between the two cases "would immediately gain practical relevance if the buyer, according to Article 39, lost his rights because he failed to give notice of the non-conformity."² In other words, if in such instances the seller is held to have performed his obligation of delivery by placing at the buyer's disposal or handing over goods which are entirely different from the ones agreed by the parties, then the buyer will lose his right to invoke the remedies provided in Article 45 and following where he fails to give timely notice specifying the non-conformities in the goods to the seller. On the other hand if the placing at the buyer's disposal, or handing over to his agent, such goods does not constitutes delivery, then the buyer need not give any notice to the seller and, therefore, he can sue the latter for the remedies under the said Articles. Referring to the difficulties caused by the distinction between the delivery of merely defective goods (a "*Peius*") and the "delivery" of an *aliud* which really is no delivery at all under German law, Professor Schlechtriem rejected the Secretariat's Commentary that where something entirely different has been delivered there is no delivery within the meaning of Article 30 and following, and, accordingly, suggested that the seller should be assumed to have fulfilled his obligation of delivery "whenever the goods handed over to the buyer or carrier have been selected for the purpose of performing the sales contract in question."³ His view, however, seems to be unsound and even

² Schlechtriem, "*The Seller's Obligation Under the United Nations Convention on Contracts for the International Sale of Goods*" in H. Smith, *International Sales* (New York, 1984) at chapter 6, pp. 12-13.

³ *Ibid.*, at p. 13

dangerous for the buyer, since, the seller who intentionally, or by his gross negligence, delivers goods which are entirely different from the ones provided for in the contract should not be allowed to escape liability for breach of the contract simply because of the buyer's failure to give notice specifying the nature of his breach. This view is particularly important where the buyer stores the goods in a warehouse for a long period without having an opportunity to examine them. Of course, such a seller will be automatically liable for his fraud against the buyer under civilian systems but this liability does not arise where Anglo-US law is applicable to the contract. Moreover, as pointed out above under Article 67(1), the risk of loss passes to the buyer as soon as the goods are handed over to the first carrier. In accordance with Professor Schlechtriem's view, this means that the buyer has to bear any loss caused by accidental damage to, or destruction of, the goods delivered even though they were entirely different from the ones described in the contract.⁴

The drafters of the CISG have not defined the term "delivery". As in Iranian law, however, it may be deduced from the provisions of the CISG that delivery consists of the acts which the seller is required to do in order for the purchaser to acquire proper possession of the goods bought. Thus, as in various national systems, such as Iranian, French and English law, the obligation to deliver may be effected either by actual delivery or by constructive delivery of the goods to the buyer or to his agent authorised to take their possession. Accordingly, the seller need not always hand over the goods to the buyer to fulfil his obligation under Article 30. Delivery may also take place "by placing the goods 'at the disposal' of the buyer"⁵ through, for example, marking of the timber to be fetched by him.

The most common method of constructive delivery in international trade is the so-called sale involving carriage in which the seller is under an obligation to organise

⁴ In accordance with Article 66 of the CISG:

"Loss of or damage to the goods after the risk has passed to the buyer does not discharge him from his obligation to pay the price, unless the loss or damage is due to an act or omission of the seller."

⁵ O. Lando, in Bianca-Bonell, *Commentary on the International Sales Law* (1987) at p. 31.

transportation⁶ and to hand the goods over to the first carrier for transmission to the buyer.⁷ In 1992, for example, there was an before the Italian Constitutional Court that Article 1510(2) of Italian Civil Code under which the seller is regarded to have performed his obligation to deliver by handing over the goods to the carrier, was inconsistent with the principle of equality provided for by Article 3 of the Italian Constitution. In fact, under the general rule contained in Article 1228 of the Italian Civil Code the carrier should be regarded as the agent of the seller, who would be liable for the agent's acts. Referring to Articles 31 and 67 of the CISG the Constitutional Court rejected this argument by stating, *inter alia*, that Article 1510(2) of the Italian Civil Code reflected a rule generally accepted at international level. In other words, like civilian and common law systems, the CISG considers the seller to have fulfilled his obligation to deliver by handing over the goods to the first carrier. Article 31 speaks of the first carrier because there are usually several carriers involved. If only a single carrier is involved in the carriage of the goods sold, then he is also the first carrier for the purpose of the CISG even though there is no second one. According to Article 67(1), as soon as the seller has handed the goods over to the first carrier he not only fulfils his obligation to deliver but he also shifts the risk of loss to the buyer.⁸ Nonetheless, this rules is applicable only if the carrier is

⁶ The CISG does not expressly provide that the seller in such instances is obliged to arrange for transportation, instead Article 32(2) states:

“If the seller is bound to arrange for carriage of the goods, he must make such contracts as are necessary for carriage to the place fixed by means of transportation appropriate in the circumstances and according to the usual terms for such transportation.”

However, as Professor Schlechtriem noticed it seems that, in the absence of an agreement to the contrary by the parties concerned, “the seller must not only hand over to the first carrier but also arrange for the shipment”. See Schlechtriem, “*The Seller's Obligation Under the United Nations Convention on Contracts for the International Sale of Goods*” in H. Smith, *International Sales* (New York, 1984) at chapter 6, p. 6-11.

⁷ See *United Nations General Assembly*, A/CN.9/SER.C/ABSTRACTS/7 (12 July 1995) Case 91, p. 3.

⁸ As an example, see United Nations Commission on International Trade Law,

operating independently from the seller. Accordingly, delivery does not take place by handing the goods over to a carrying company which is run by the seller himself or by an agent operating on his behalf.⁹ Whether a forwarding agent is a carrier for the purpose of effecting delivery is an issue which is left to be solved by a domestic law. In contradiction with the CISG's main purpose in bringing about uniformity at a world-wide level in the law of international sales contract, this issue may lead to forum shopping by the parties concerned since whilst the legal system of some countries, such as Germany, considers a forwarding agent as a carrier, under other legal systems, such as those of England and Sweden he may be a carrier depending upon his contract with the person who engages him.

If, in the foregoing instances, the seller has agreed to send the goods sold, Article 32(2) of the CISG requires him not only to hand the goods over to the first carrier, but also to conclude the contract necessary for transportation appropriate in the circumstances, and according to the usual terms for such transportation. Whether the seller is also bound to provide for adequate insurance depends on the terms of the contract, including trade usage or any course of dealing between the parties.¹⁰ In any event, where the contract does not require the seller to provide for insurance under Article 32(2) he is, nevertheless, bound, at the buyer's request, to provide him with all available information necessary to effect such insurance.

Following Article 32(1) of the CISG, the seller who, in accordance with the contract or the CISG, hands over the goods to a carrier is required to give the buyer notice of the consignment specifying the goods if they are not clearly identified to the contract by marking on the goods, by shipping documents or otherwise. The CISG

A/CN.9/SER.C/ABSTRACTS/12 (26 May 1997) Case 163 pp. 2-3, where the Hungarian Court attached to the Hungarian Chamber of Commerce and Industry applying the CISG held that the risk in the goods passed to the Hungarian buyer when they are handed over by the Yugoslav seller to the first carrier.

⁹ See, F. Enderlien, *Rights and Obligations of the Seller under the UN Convention on Contracts for the International Sale of Goods*, in Sarcevic P. and Volken P. (Eds.), *International Sale of Goods*, (1986 New York-London-Rome) at p. 145.

¹⁰ See CISG, Article 9.

does not state when the notice is to be given to the buyer. Under some trade terms, such as F.O.B., the seller is obliged to give notice to the buyer immediately after the goods are handed over to the carrier. Nonetheless, the drafters of the CISG failed to clarify when the seller must give notice where the contract contains no provision in this regard. This is likely to create an uncertainty for the parties concerned. The issue, however, can be obviated by referring the case to the CISG's general principle provided in Article 7(2) upon which the seller must give notice of the consignment within a reasonable time after delivery. Under the circumstances, this may be a very short time. The seller's failure to give notice in time is a breach of the contract which entitles the buyer to sue him and seek one or more of the remedies under Article 45 and following.¹¹ Moreover, in accordance with Articles 67(2) and 69(3) the risk in the goods does not pass to the buyer before they are clearly identified to the contract and, consequently, the seller must give notice to the buyer for this identification.

Another method of constructive delivery may take place by transfer of possession of the goods symbolically through handing over to the buyer documents which allows him to obtain possession of the goods purchased. This method has been approved by Article 30, which expressly indicates that the CISG applies to sales transactions that involve delivery of documents. In other words, in some instances, such as when the goods are stored by the seller's agent or when they are on board of a ship at sea, the seller may perform his obligation of delivery by instructing the buyer or by handing over the corresponding documents to him. Where trade terms are used they often prescribe which documents are to be handed over to the buyer.¹² Article 34 of the CISG requires the seller to hand over these documents at the time and place and in the form provided in the contract. Where the contract is silent, the

¹¹ These remedies includes; to claim damages (Article 46(3)) or, to require delivery of substitute goods (Article 46(2)) or, to require repair (Article 45(1)(b)) or, to fix additional period of time for performance (Article 47) or, to declare the contract avoided (Article 49). For details of these remedies see pp. 157-180, post.

¹² For example, in the case of a C.I.F. contract, the seller must furnish the buyer with the commercial invoice of the goods shipped (INCOTERMS 1990 ed., C.I.F., A1), a clean transport document such as a clean negotiable bill of lading (INCOTERMS 1990 ed., C.I.F., A8), and an insurance policy (INCOTERMS 1990 ed., C.I.F., A3b). For details of this clause and other clauses under

document delivered must conform with trade usage and where there is no trade usage, the seller under the principle of good faith must hand over the documents at such time and in such form as will enable the buyer to obtain the goods from the carrier when they arrive, and to bring them through customs.

Place of delivery

Concerning the place of delivery, the parties, under the principle of freedom of the contract underlying the CISG, may freely choose the place where the goods are to be delivered.¹³ Where the parties fail to agree on the place of delivery then the drafters of CISG distinguish between three possibilities. They distinguish between a sale, which involves carriage,¹⁴ and the one in which the seller is required to place the goods at the buyer's disposal at a certain place.¹⁵ The third possibility arises where the parties concerned elect none of the foregoing alternatives, in which case the goods must be put at the buyer's disposal at the seller's place of business.

As mentioned above the place of delivery is usually agreed between the parties and therefore, Article 31 of the CISG begins by stating:

“If the seller is not bound to deliver the goods at any other particular place...”

Parties seldom fail to agree on the place of delivery, for this place is decisive for several other topics, e.g., usually passing of risk to the buyer. In some instances, the seller may undertake to deliver the goods at the buyer's place of business, a provision that may be stipulated by the Incoterms “delivery duty paid (place of buyer's business).”¹⁶ In other instances, the contract may call upon the seller to deliver the goods at the place of business of the buyer's customer, to whom the buyer has

INCOTERMS 1990, see Jan Ramberg, *Guide to incoterms 1990* (1991, ICC Publishing SA).

¹³ See CISG, Article 6.

¹⁴ See CISG, Article 31(a).

¹⁵ See CISG, Article 31(b).

¹⁶ For this clause, cf. Ramberg, *Incoterms 1980*, in *The Transnational Law of International Commercial Transactions* (ed. N. Horn & C. Schmitthoff 1982), pp.137, 138 ff., 142 and 143.

already resold the goods. In both of these cases, the seller's obligation involves transporting the goods and he will be liable for breach of the contract under Article 45 and following if the goods are damaged in transit unless he can show that the loss or damage in transit was caused by an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the contract or to have avoided or overcome it or its consequences.¹⁷ In such instances, the risk passes to the buyer in accordance with Article 69 of the CISG.¹⁸

Unfortunately, the contractual stipulation as to delivery of the goods to the buyer's or his customer's place of business may have appeared to be so unusual to the drafters of the CISG -who may primarily have considered overseas transactions- that "the seller's obligation to transport the goods to the buyers place of business" has not been specifically provided for in the CISG. Surely, there are many cases in international trade in which sellers undertake to deliver the goods either, by their own people or through independent carriers, to buyers', or their customers', place of business.

Article 31(b) of CISG covers situation in which the contract calls for the buyer to fetch the goods himself. Nonetheless, this situation would seem less frequent in international trade. On the one hand, this happens where the purchaser, in the absence of alternative contractual provisions, is required to pick up specific goods, such as a car or a combine, at the place where the parties at the time of the contract knew they were located. On the other hand, it may applied to the cases where goods are not yet identified or goods which are to be manufactured or produced and which, in the case of doubt, are to be placed at the buyer's disposal at the place where they are to be drawn from a stockpile or to be manufactured or produced.¹⁹ In both cases, the seller

¹⁷ CISG, Article 79. It is to be mentioned that the seller's liability for loss or damages to the goods in transit in the foregoing instances can be avoided only if he can rely on Article 79(1) of the CISG, where the carriage is performed by the seller's own people, or on Article 79(2), where he avail himself of an independent carrier.

¹⁸ For the full provisions of this Article, see Appendix V.

¹⁹ See, for example, *United Nations General Assembly*, A/CN.9/SER.C/ABSTRACTS/3 (24 May 1994) Case 47, p. 3.

effects his obligation of delivery once he places the goods at the disposal of the buyer at the place where they were located at the time of the contract, whilst the risk under Article 69(1) of the CISG may pass to the buyer some later time. Similar situation may arise when the seller has placed the goods at the disposal of the buyer at a place other than the seller's place of business, as required by the contract, and the buyer does not yet know that the goods are ready to be fetched by him.²⁰ It seems that the seller's obligation as to delivery is terminated by his placing the goods at the buyer's disposal,²¹ but the risk has not yet passed to the buyer since he has not been aware of the fact that the goods have been placed at his disposal as required by Article 69(2). Accordingly, if the goods in such circumstances are destroyed, the seller does not have to deliver, nor can he claim the purchase price. The seller does not need to deliver because he has already performed his obligation to deliver by placing the goods at the buyer's disposal at the place provided by the contract, and he is not entitled to claim the purchase price because the risk in the goods has not yet passed to the buyer. If, after the performance of the obligation of delivery by the seller, the goods are destroyed other than accidentally, he may be liable against the buyer for damages because of his failure to comply with his duty under Article 85 to take such steps as are reasonable in the circumstances of the case to preserve the goods. Article 31(b) also concerns stored goods and goods at sea. In such instances, the seller is bound to "place the goods at the disposal of the buyer" by instructing and/or handing over the corresponding documents to him.

Following both the civilian and common law of sale, Article 31(c) of the CISG contains an escape provision whereby the seller, in the case of doubt, is bound to place the goods at the buyer's disposal at his place of business. The problems under

²⁰ See CISG, Article 69(2).

²¹ This view, however, can be criticised on ground of being unjust to allow the seller to discharge himself of his obligation as to the delivery by placing the goods at the disposal of the buyer without informing the latter of the performance. In fact, it could be said an obligation as to delivery does not takes place where the seller places the goods at the buyer's disposal but fails to give such notification as is necessary to enable the latter to take them into his possession. See Lando, *Obligations of the Seller*, in Bianca-Bonnel, *Commentary on the International Sales Law* (1987) at p. 255.

former systems, concerning the cases where the seller has more than one place of business or where he has no place of business, have been expressly addressed by Article 10 of CISG. Under this Article:

- “(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract;
- (b) if a party does not have a place of business, reference is to be made to his habitual residence.”

As can be seen, under this Article the criteria for determining the relevant place of business is the place with the “closest relationship to the contract and its performance”. To find out which place has closest relationship to the contract this Article continues that regard is to be given to “the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract”. It seems appropriate to reverse the order of application of these criteria since what is contemplated by the parties should reasonably be given priority over those which are only known to them. Obviously, adoption of the provisions of Article 10 is a significant step towards reducing uncertainties in specifying the place of delivery where the contract contains no provision in this regard. It is, however, submitted that these provisions, do not go far enough to diminish completely uncertainties between the parties in the foregoing situations.

As mentioned earlier, when the contract “involves carriage of goods”, the delivery takes place by handing the goods over to the first independent carrier organisation²² which undertakes to carry them for transmission to the buyer. In other words, the place of delivery in such instances is the place where the seller puts the goods into the possession of the first carrier. As can be seen the initiative in delivering of the goods in a sale involving carriage is on the seller. The typical act envisaged by Article 31(a) is the seller’s taking the goods to the carrier’s premises where they will be put into the latter’s possession for transmission to the buyer. The seller, however, may discharge his obligation to deliver by other arrangements, such

²² See P. Schelechtriem, *Commentary on the International Sales of Goods (CISG)* (Oxford: Clarendon Press, 1998) pp. 226-235.

as to make an agreement with the carrier whereby he undertakes to come to the seller's premises to take the goods from a stockpile which the seller has indicated to him in advance. In such circumstances, delivery takes place as soon as the carrier takes the possession of the goods and the place of delivery is the place where the goods are put into possession of the carrier.

Where the sale involve carriage but it contains trade terms, such as F.O.B., C. & F., and C.I.F., the place of delivery is the ship's rail, even though the carriage by sea is not the first carriage.²³ In other words, where trade terms are used, Article 31(a) will add little, if anything, to the seller's duties provided in the contract. Moreover, the trade terms cited above address several questions not covered by Article 31, such as whether the seller or the buyer is to liable for providing the export license and for payment of export taxes. Despite these advantages which associated with the aforesaid trade terms, there has been a dispute over the exact point when loading takes place where the term "the ship's rail" is used in the contract of sale involving carriage of the goods by sea. To ascertain this point is vital for various parties since:

(1) it is this point which the seller's duty as to the delivery of the goods to the buyer ends and thereafter the latter loses the right to sue him for non-delivery of the goods, and

(2) in the absence of an agreement to the contrary the property and the risk of loss²⁴ in the goods passes to the buyer upon delivery of them to the carrier. Therefore, the exact point when loading takes place is not only important for the seller and the buyer in the contract of sale but also for their respective insurance companies since it determines which party's company has to bear the liability for the damages to the goods.

The aforesaid dispute related to the fact that during the loading process the goods will normally be swung across "the ship's rail" by a crane or derrick before being taken on board for their stowage there and in the case of commodities such as

²³ J.D. Feltham, "The United Nations Convention on Contract for the International Sale of Goods", (1991) *Journal of Business Law* 413, at 417.

²⁴ See, for example, *Colley v. Overseas Exporters* [1921] 3 KB 302. See further, J.D. Feltham, "The United Nations Convention on Contract for the International Sale of Goods", (1991) *Journal of Business Law* 413, at 424.

oil or grain, they will be pumped or sucked through a pipe on shore. Therefore, the question in the former case is whether shipment takes place when the cargo is lifted to the rail of the ship or when they are taken and being stowed on board. Referring to this question in the *Pyrene & Co. Ltd. v. Scindia Navigation Co. Ltd.*,²⁵ Devlin J. rightly stated:

“... the division of loading into two parts is suited to more antiquated methods of loading than now generally adopted and the ship’s rail has lost much of its nineteenth century significance.”²⁶

This statement is a reference to the old view that it was the duty of the seller/shipper to perform the first part of the loading by lifting of the cargo to the rail of the ship while, the carrier was bound to carry out the second and last part of the loading by taking the cargo from the ship’s rail on board and stow it. Devlin J. highlighted the problem of distinguishing between these two stages of loading by noting that:

“Only the most enthusiastic lawyer could watch with satisfaction the spectacle of the liabilities shifting uneasily as the cargo sways at the end of a derrick across a notional perpendicular projecting from the ship’s rail.”

In fact , it is very hard and costly to determine the exact point when the goods are lost or damaged during the two stages of loading operation . On this basis , Develin J. rightly held that in the contract of carriage by sea, the loading operation had to be taken as an indivisible whole and therefore, the carrier’s liability for negligence covers both stages of loading operation irrespective of whether the loss or damages in the cargo occurred before or after the crossing of the ship’s rail.²⁷ Nonetheless, the question with regard to the contract of sale has been left open; that is whether in contracts such as a F.O.B. contract the risk and the property in the goods passes to the buyer when they pass the rail of the ship nominated for their transportation or the seller’s duty as to the delivery is performed only if the goods are safely transferred and stowed on board the vessel. Under the former view, the meaning of loading of

²⁵ [1954] 2 QB 402.

²⁶ *Ibid.*, at p. 419.

²⁷ *Ibid.*

the goods in the case of sale of goods differs from its meaning in the contract for their carriage by sea while in accordance with the latter view, the meaning of loading in both the contract of sale and the contract of carriage is the same. However, given the fact that the nature of the problem associated to both these contract with respect of determining the exact point when the loss or damages to the goods has occurred during the process of loading in is the same, the latter approach seems logically preferable to the former one as suggested by some commentators.²⁸ The approach conforms with the latest version of Incoterms 1990 which defines the duty of the F.O.B. seller to “deliver the goods *on board* the vessel”²⁹ and has the advantages of avoiding both the foregoing problem and the confusion arising from attributing of different legal meanings to the term “loading” under the latter approach.³⁰

Where the contract contains no such trade terms, and in the absence of an agreement to the contrary by the parties, the rule of most jurisdictions seems to require the seller who is to dispatch the goods to a foreign country to also provide the necessary export license and to pay export taxes, whilst, the buyer, on the other hand, is bound to procure the necessary import license and to pay import duties.

The seller is not discharged from obligation to deliver, and the risk will not pass to the buyer who does not take delivery where provisions as to the place of performance have not been properly observed by the seller. This impliedly entails that the seller, like the respective rules of numerous domestic laws, in the absence an agreement to the contrary in the contract, should bear any expenses which are necessary to put the goods into a deliverable state, notwithstanding the fact that the CISG is silent on this issue.

²⁸See Sasson and Merren, *C.I.F. and F.O.B. Contracts*, (4th ed. 1995), at para. 562; Schmittoff, *Export Trade* (9th ed. 1990), at p. 26. This view also followed in *Colley v. Overseas Exporters* [1921] 3 KB 302, where MacCardie J. held that the risk passed to the buyer when the seller placed the goods safely on board the vessel.

²⁹ See (INCOTERMS 1990 ed. F.O.B., A2).

³⁰ The same view has been taken by Professor Feltham; see J.D. Feltham, “The United Nations Convention on Contract for the International Sale of Goods”, (1991) *Journal of Business Law* 413, at 423.

Time for delivery

The CISG's provisions concerning delivery time have been set in Article 33 under which the seller is bound to deliver the goods sold:

- “(a) if a date is fixed by or determinable from the contract, on that date;
- (b) if a period of time is fixed or determinable from the contract, at any time within that period unless circumstances indicate that the buyer is to choose a date; or
- (c) in any other case, within a reasonable time after the conclusion of the contract.”

Both clauses (a) and (b) of this Article reiterate the parties' autonomy in providing the time for delivery of the goods by the seller in the contract. Usually the parties will agree on the time of delivery in their contract; however, the delivery time can also be determinable from the contract if it follows from the established practices or usage impliedly made applicable.

Article 33(b) is similar to Article 13 of the 1905 Scandinavian Sale of Goods Act and the English law of sale, and covers cases in which the parties fix a period of time within which the delivery is to take place. In such instances, it is, generally, the seller who is to choose the time for delivery within that period. Delivery must take place by the end of this period. During the period he can discharge his obligation by delivering the goods sold and obliging the buyer to take them into his possession. In other words, agreement on a period of time often gives the seller the necessary flexibility to prepare the goods for delivery and arrange the transport.

On the other hand, if the circumstances of the contract indicate that the buyer is to choose the delivery date, the seller must deliver at the date chosen by the buyer. This will be the case where the buyer himself has to arrange for the transportation of the goods purchased. Accordingly, the buyer's responsibility, as in the F.O.B. clause, to charter a vessel or reserve the necessary space on board a vessel should be taken as an indication that the buyer may choose a date of delivery within the agreed period.

If, for any other reason, e.g. the capacity of his warehouse, the buyer needs to fix an exact date to receive the goods purchased, he should reserve the right to choose the date of delivery. In such instances, the buyer has to send the necessary shipping

instructions to the seller within a reasonable period of time before the time of delivery allowing the seller to deliver on time.

Article 33(c) covers cases where there is no agreement between the parties as to the time of delivery and no date or period is determinable from the contract or from practices or usage. This Article, which corresponds to the respective rules of numerous domestic laws, such as section 2-309(1) of the UCC and section 29(3) of the UK Sale of Goods Act 1979, provides that the seller, in such instances, must deliver within a reasonable time after the conclusion of the contract.³¹ What is reasonable time is a question of fact, which may differ from one case to another. It seems that the provisions of Article 33(c) are also applicable to the cases where the contract calls on the seller to deliver in an unascertained time, such as “as soon as possible”. Since the circumstances which play a part in construing such an unascertained term as “as soon as possible” are also determined by such factors as how much time the arrangement of transportation requires; how long it takes for the seller to procure or if he is also the manufacturer to produce the goods sold, and so forth. Similarly, it may be argued that the rule in Article 33(c) should also cover the cases where the time of delivery has been tied to the occurrence of an uncertain event so as to require the seller to perform his obligation within a reasonable time after entering into the sale with the buyer. This approach also complies with the general principle of good faith which, following Article 7(1), must be observed in the interpretation of the CISG.³² Finally, the same rule should apply to the cases where the right for fixing of a date for delivery is given to the buyer or to a third person by the contract but he fails to do so within a reasonable time after the conclusion of the

³¹ In contrast with these provisions, Iranian law, like the German system (BGB, Article 271(1)), provides for immediate delivery of the goods by the seller after conclusion of the sale between the parties. The hardship of such provisions, under the latter system, is somewhat modified by applying the principle of the good faith in relationships between the parties whereby the special circumstances of the particular case have to be considered. See Schlechtriem, *The Sellers Obligation Under the United Nations Convention on Contracts for the International Sale of Goods* in H. Smith, *International Sales* (New York, 1984), Ch. 6, pp. 6-16.

³² For the full text of Article 7 of the CISG, see Appendix V.

contract, i.e., the seller must deliver within a reasonable time after the buyer's failure to fix the time for delivery. It may be argued that the seller in such instances should be discharged from the obligation to deliver the goods where he has not received a notice from the buyer fixing a date for delivery within a reasonable time after the conclusion of the contract. Nonetheless, this argument does not comply with the parties' common will to preserve the sale by performance of their respective obligations under it. Where, however, the period within which the buyer can determine the date for delivery is limited under the contract, the seller may discharge himself from any liability for not performing the contract if the buyer fails to choose a date of delivery within that period.

In contrast with French law,³³ the CISG does not require the buyer to give notice to the seller requiring him to deliver the goods at the time fixed in the contract. In other words, like both common law and the Iranian legal systems, the mere delay by the seller in performing his obligation to deliver is sufficient to allow the buyer to discharge himself from further liability under the sale and to resort to the remedies provided by the CISG for breach of the contract. The same rule is applicable to the cases where, because of the parties' failure to agree on a fixed delivery date, the seller is obliged to deliver the goods within a reasonable time after making of the contract with the buyer. Nonetheless, this rule does not apply where the contract call upon the seller to deliver "on request" or "as required" or on similar terms in which case the seller has no obligation to deliver before receiving a notice from the buyer asking him to do so. As in English law, however, once the seller receives such a notice he must deliver on the time fixed by the buyer in the notice provided that it is not unreasonable under circumstances of the case.

In accordance with Article 52(1) of CISG in the case of early delivery of the goods the buyer has an option either to take delivery or refuse to take delivery. This rule is consistent with English law, under which delivery of the goods before the date set in the contract is considered as breach of the contract which entitles the buyer to reject the goods where he wishes to do so. This rule, however, seems to be defective

³³ See p. 102, ante.

as there is no justifiable ground why the buyer should not be bound to take delivery of the goods in such instances where it does not cause any unreasonable inconvenience to him, particularly as he may demand compensation from the seller for any damage which he has suffered as a consequence of taking delivery of the goods before the date fixed in the contract.³⁴ This approach is consistent with the principle of good faith under Article 7(1) of the CISG which the parties are required to observe in performance of their respective obligations.

The CISG does not state whether the seller may redeliver the goods at the contractual date where, following Article 52(1) of the CISG, the buyer refuses to take delivery of the goods delivered before the date fixed by the parties. The answer to this question seems to be positive as it is unreasonable to hold the seller liable for breach of the contract whilst he is able and willing to perform his duty to deliver in conformity with the contractual terms.

Quantity of the goods delivered

Like the respective rules of many local jurisdiction, such as Iranian, French and English law, Article 35(1) of the CISG requires the seller to deliver the correct quantity of goods.³⁵

According to Article 52(2) of the CISG:

“If the seller delivers quantity of goods greater than that provided for in the contract, the buyer may take delivery or refuse to take delivery of the excess quantity. If the buyer takes delivery of all or part of the excess quantity, he must pay for it at the contract rate.”

In other words, unlike US, English, and French law, the CISG in such instances rightly binds the buyer to take delivery of the goods included in the contract, whilst allowing him to refuse or to take delivery of all or part of the excess quantity. It is irrational to allow the buyer to reject the whole goods delivered simply because their

³⁴ For the case decided under CISG see, *United Nations General Assembly*, A/CN.9/SER.C/ABSTRACTS/10 (16 August 1996) Case 141 p. 10.

³⁵ For the full text of this Article, see Appendix V.

quantity is larger than the contractual amount and then to sue the seller for non-delivery whilst he has an opportunity to take delivery of the amount provided in the contract. On the other hand, it is equally wrong, in such instances, to force the buyer either to accept or to reject the whole amount delivered to him if for any reason he does not wish to take delivery of the excess in quantity.

The CISG's provision requiring the buyer to accept the goods included in the contract if the amount is identical to that of Iranian law. But whilst, Article 384 of the Iranian Code states that excess in quantity belongs to the seller, the CISG grants the buyer an option to reject the excess or take delivery of all or part of it and pay additional price at the contract rate for that part of the excess which is accepted by him. Delivery of the excess in quantity by the seller could be regarded as an offer to sell all or any part of it to the buyer at the contract rate that can be accepted by the latter. Considering the high cost of returning of the excess in quantity of goods delivered to the seller in an international sale, it appears reasonable to let the buyer to accept the excess in quantity or any part of it at the contractual rate. Nonetheless, these grounds seem unconvincing, and therefore the buyer's option under the CISG unjustifiably favour him in those cases where both the excess in quantity and the market price of the goods delivered are substantially higher than what provided for in the contract. This is so, particularly if there is evidence which indicates that the buyer knew or he should not reasonably have been unaware that the seller has mistakenly delivered the excess in quantity to him. However, given the fact that the other provisions of the CISG generally favour the seller, the buyer's option in such a rare instances may be justifiable.

Unlike the various European Civil Law Codes, Article 37 of the CISG rightly permits the seller who delivers before the date for performance, to deliver up to that date a missing part or a missing quantity of the goods provided that "exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense".³⁶ The rule is further progress towards maintaining of the contract and promoting of the principles of fairness and good faith in national and international

³⁶ For the full text of this Article, see Appendix V.

trade.³⁷ Nonetheless, the application of this rule has been restricted by the provisions of Article 52 (1), under which the buyer may refuse to take delivery of the goods delivered before the date fixed in the contract. It seems that there is little or no reasonable ground for not requiring the buyer to take the delivery of the goods which have been delivered before the date fixed in the contract if it causes no unreasonable inconvenience to him and if he can recover any damages caused by the early performance, while in the event of non-refusal of early performance he is bound to allow the seller to deliver the missing part of the goods or remedy their non-conformity up to the date of delivery and in some circumstances even after the date for delivery under Article 48. Under these provisions of Article 52(1), the rule in Article 37 applies only to the cases where either the parties have set a period allowing the seller to deliver at any time within that period, or where the buyer has not refused to take delivery of the goods delivered before the time agreed between the parties. However, it seems that even in the event of the buyer's refusal of an early performance by the seller, the latter may still be able to integrate the delivered goods with any missing part and to redeliver them at the time of delivery fixed in the contract. In other words, the seller's violation in early performance of the contract should not be construed as a fundamental breach of the contract, in the sense of Article 27 CISG, so as to entitle the buyer to avoid the contract and thereby to deprive the seller from redelivering of the goods at the time fixed in the contract.

In contrast with Iranian law,³⁸ under which any shortfall in quantity of the goods entitles the buyer either to cancel the sale or accept the goods delivered and pay for them at the contract rate, Article 51(1) of the CISG³⁹ states that the seller's breach in such circumstances triggers the uniform remedies under Article 46 and the following for the shortfall,⁴⁰ whilst the buyer is bound to pay for the delivered part of the goods at the contractual rate.⁴¹

³⁷ Bianca, *Cure before date for delivery*, in Bianca-Bonell, *Commentary on the International Sales Law* (Giuffr  . Milan. 1987) p. 37.

³⁸ See further p. 114-115, ante.

³⁹ For the full text of this Article, see Appendix V.

⁴⁰ These remedies entitle the buyer either to claim damages for the shortfall under Article 46(3), to fix

As in French and English law, the buyer may avoid the contract in its entirety only if the shortfall constitutes fundamental breach of the contract,⁴² and if he gives notice to the seller specifying the nature of the breach within a reasonable time after he has discovered it or ought to have discovered it.⁴³ This was the case, for example, where a German seller not only failed to deliver the goods within the contractual time, but also refused to do so within an additional period of two weeks set by the Egyptian buyer for delivery. Instead, the seller shortly after that period offered the buyer shipment of the goods against advanced payment. The buyer refused this offer and seven weeks after fixing the additional delivery period declared the contract avoided. The German court considering the CISG, held that the buyer was right to do so. According to the court, the seller had breached the contract by refusing to deliver the goods within the time fixed by the contract (Art. 33(b) of CISG), thus giving the buyer to fix an additional period of time (Arts. 49(1)(b) and 47(1) of CISG). Consequently, the buyer was entitled to avoid the contract even if the additional period of two weeks was perhaps too short for delivery.⁴⁴ A Russian tribunal reached a similar decision under CISG against the Russian seller who failed to carry out his obligation of delivery of a specific quantity of chemical products within a period of time specified in the contract (fourth quarter of 1992) with a German buyer. In this case the buyer from January to May 1993 repeatedly demanded that the seller deliver the goods sold and informed his readiness to extend the time limit for delivery. In May 1993, the buyer avoided the contract with the seller and purchased replacement

an additional period of time for delivery of the shortfall under Article 47(1), or to avoid the contract with respect of the shortfall under Article 49(2)(b)(ii) if the seller fails to deliver within that additional period. For a detail discussion of these remedies, see pp. 162-179, post.

⁴¹ For example, in one case the court, applying the CISG, held the defendant, a German seller, to be responsible to refund the buyer the price of the three missing printing machines at the contractual rate. See, *United Nations General Assembly*, A/CN.9/SER.C/ABSTRACTS/10 (16 August 1996) pp. 6-7.

⁴² See, CISG, Article 51(2).

⁴³ See, CISG, Article 39.

⁴⁴ *United Nations General Assembly*, A/CN.9/SER.C/ABSTRACTS/10 (16 August 1996) pp. 6-7. The court further found that the fact that the seller had offered shipment against advance payment was irrelevant since advance payment of the full contract price was contrary to the contractual terms agreed between the parties concerned. *Ibid.*

goods from a third person for those specified in the original contract. The tribunal decided that as a result of the seller's breach the buyer was entitled to avoid the contract and to apply for damages caused by the breach.⁴⁵

Further restriction for the buyer's ability to avoid under the CISG has been imposed by Articles 34, 37 and 48 which, in certain circumstances, grant the seller a right to cure the lack of conformity in the goods before the buyer can avoid the contract. Nonetheless, unlike the French system, where the buyer under the CISG is entitled to avoid the contract he needs not to obtain a court's authority to do so.

The seller's right to cure

The seller's right to cure a non-conforming tender prior to the date of performance is found in CISG Articles 34 and 37. These Articles, like UCC⁴⁶ and English law⁴⁷ give the seller an unfettered right to cure any non-conformity in documents of sale or performance if the seller has delivered the documents or non-conforming goods prior to the contractual date for delivery.⁴⁸ But the right under both those Articles is limited to the cure that is effected before the date for delivery fixed in the contract and, unlike the latter system, can only be exercised if it "does not cause the buyer unreasonable inconvenience or unreasonable expense." In any case, the buyer retains the right to claim damages. In fact, the purpose of the rules in both Articles 34 and 37 is to save the contract from destruction on technical and trivial grounds without disturbing the balance of the parties' respective interests in dealing with each other.

⁴⁵ *United Nations General Assembly*, A/CN.9/SER.C/ABSTRACTS/10 (16 August 1996) Case 140, pp. 9-10.

⁴⁶ UCC, Section 2-508(1).

⁴⁷ Barry Nicholas, "The Vienna Convention on International Sales Law" (1989) 105 *Law Quarterly Review* 201, 224.

⁴⁸ See CISG, Articles 34 and 37.

Like the UCC,⁴⁹ the CISG under certain conditions permits the seller to cure the lack of conformity in the goods after the date for delivery. Accordingly, Article 48(1) of the CISG states:

“Subject to Article 49, the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations, if he can do so without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty or reimbursement by the seller of expenses advanced by the buyer. However, the buyer retains any right to claim damages as provided for in this Convention.”

As can be seen, this article starts with the words, “subject to Article 49, the seller may ... remedy ...”. Article 49 grants the buyer a right to avoid the contract where the seller’s failure to perform any of his obligation amounts to a fundamental breach of the contract, or where the seller has failed to deliver the goods within the additional period of time fixed by the buyer or has declared that he will not deliver within the period so fixed.⁵⁰ This means that the seller’s right to cure the lack of conformity in the goods delivered after the date for delivery depends on whether the buyer has rightfully avoided the transaction in accordance with Article 49. Accordingly, in contrast with section 2-508(2) of the UCC whereby the seller’s right to cure depends on whether he reasonably believed that a non-conforming tender was acceptable, under the CISG the seller may cure only if two conditions are met, namely, the buyer has not rightfully avoided the contract and that curing the non-conformity would not cause him unreasonable inconvenience.

Nonetheless, the condition of non-avoidance raises the fundamental question of whether the buyer’s right to avoid the sale under Article 49 or the seller’s right to cure under Article 48 should prevail. Under Article 44(1)⁵¹ of the Draft Convention the seller is allowed to cure a late or non-conforming tender “unless the buyer has declared the contract avoided in accordance with Article 45.” This provision, which favoured a buyer’s right to avoid, was of concern to numerous delegates at the

⁴⁹ See pp. 52-61, ante.

⁵⁰ For the full provisions of Article 49 of the CISG, see Appendix V.

⁵¹ For the full provisions of Article 44(1) of the Draft Convention, see Appendix V.

Conference who sought delete these limiting words.⁵² After considering three alternative proposals, the Conference finally adopted Article 48(1) of the CISG which begins with the words "Subject to Article 49, the seller may... remedy...."⁵³ Referring to this procedure, Professor Honnold argues that the change in words leaves little doubt that the seller's right to cure prevails over the buyer's right to avoid.⁵⁴ To find otherwise, he maintains, would make meaningless the seller's right to cure.⁵⁵ Professor Honnold's view is not shared by other prominent authors, such as Professor Ziegel who argues that:

"there is no requirement in the Convention requiring an injured party to give a breaching party an opportunity to cure before exercising the right of avoidance."⁵⁶

Neither of these views, however, seems satisfactory in its entirety. To give the buyer an unqualified right to avoid the contract immediately under Article 49(1)(a) without paying the slightest attention to the seller's ability and willingness to replace or repair the defects in the goods delivered even if his ability and willingness have been expressly confirmed, can hardly be a justifiable approach: under this approach the buyer is the only person who by deciding the fate of the contract can equally determine the seller's right to cure. In other words, this approach would put the seller at the buyer's mercy and empowers the latter to speculate without observing his duty

⁵² See, *United Nations Conference on Contracts for the International Sales of Goods* (Vienna, 10 March -11 April 1980), *Official Records*, New York, 1981, at 341-44, 351-53.

⁵³ See, Ziegel, "Buyer's Remedies", in *International Sales* (Galeston and Smith ed. 1984) § 9.03 at 9-22.

⁵⁴ J. Honnold, *Uniform Law for International Sales Under the 1980 United Nations Conventions*, note 1, at § 296.

⁵⁵ *Ibid.* at 312 n. 16. Honnold argues:

"Avoidance under Art. 49(1) is applicable to a wide range of circumstances other than cure, whereas the cure provisions of Art. 48(1) could be frustrated by an unqualified application of Art. 49(1). In such situations, a general provision yields to a specific. The same result follows from the conclusion that an offer to cure prevents a breach from becoming 'fundamental'.

⁵⁶ Ziegel, *Buyer's Remedies*, in *International Sales* (Galeston and Smith, eds., 1984) § 9.03 at 9-23. See further, Barry Nicholas, "The Vienna Convention on International Sales Law" (1989) 105 *Law Quarterly Review* 201, 224.

to mitigate losses under Article 77. On the other hand, it is equally untenable and even dangerous to prevent the buyer from avoiding the contract until the seller makes known that he is able or willing to cure. For this approach puts the buyer in a completely paralysed situation. He has to wait and see and lose time before he can take any action. He has to go out of his way, making efforts to investigate whether he is likely to have a real chance of receiving an effort to cure. He is put at the mercy of a distant seller who may or may not be communicative or co-operative. Such an interpretation would be inconsistent with the obligation of good faith under Article 7, which is to be observed in an international sale. Similarly, this interpretation is inconsistent with the requirement of Articles 49(2)(a) and 49(2)(I) under which the buyer will lose his right to avoid the contract where he fails to do so within a reasonable time after he knew or ought to have known of the breach. Presumably because under this interpretation the buyer should wait a reasonable time to clarify whether the seller is able or willing to cure while by the end of this time he will lose the right to avoid the contract for the fundamental breach.

Perhaps a more convincing approach is to require the buyer to refrain from avoiding the contract for a while only if he has a clear ground to suggest that the seller will cure. Such a ground is obtainable from prior experience with the seller, from a special notice, or from general conditions of the contract. This solution serves the interests of both parties by freeing an aggrieved buyer who has already suffered the seller's fundamental breach of contract from the entire range of uncertainties as to the same seller's ability and willingness to cure, and meanwhile requiring him to respect the seller's right to cure when there is a reasonable indication that he will cure.

As mentioned above, unlike the UCC the seller's right to cure after the time for delivery depends on a second condition namely, he must be able to cure without causing the buyer unreasonable inconvenience. In the words of Article 48(1), the seller may cure any lack of conformity in the goods delivered "if he can do so without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of the expenses advanced by the buyer." Delay and uncertainty of reimbursement used in this Article

are two common examples of inconvenience to the buyer. What is unreasonable inconvenience is a question of fact which may vary from case to case.

When the all conditions mentioned above are satisfied, how the seller will exercise his right to cure depends on the type of his failure and on the nature of the goods. Usually cure takes place by repairing or replacing deficient part of the goods or by delivering the shortfall in their quantities.

Where the time for delivery has passed and all or part of the goods do not arrive in time, the question arises whether and if so how the delay in delivery can be cured. Of course, time that has passed cannot be recalled.⁵⁷ But the question here is not “curing a delay” which indeed is impossible, rather it concerns how to cure the non-performance of the obligation to deliver which is certainly feasible. Accordingly, where the delivery time is not so essential as to eliminate or to reduce substantially the use of the goods delivered after that time for the buyer, belated delivery by the seller will effectively and wholly remedy the grievance.

Where the seller fails to fulfil the conditions set in paragraph (1) of Article 48, he may still cure any non-conformity under paragraphs (2) to (4) of the same Article. To do so, he must send to the buyer either a request (paragraph (2)) or a notice (paragraph (3)) both of which are effective only if received by the buyer. In accordance with Paragraph (2), the seller’s request must contain a question asking the buyer to clarify whether he will accept late performance within the period specified in the request. The buyer’s failure to reply to the seller’s inquiry within a reasonable time after receiving either the request or the notice allows the latter to cure within the period of time specified in the notice or in the request and therefore, the buyer will be barred from resorting to any remedy which is inconsistent with performance by the seller.

Pursuant to Article 46 (2) of the, the buyer may demand substitute goods upon showing that the seller’s tender constitutes fundamental breach. At the Vienna Conference, the US delegation raised the issue of whether, under the draft

⁵⁷ See Honnold, *Uniform Law for International Sales Under the 1980 United Nations Convention*, *supra.*, note 1 at p. 310.

Convention, the seller's right to cure by repair prevailed over the buyer's right to require substitute goods.⁵⁸ Professor Fransworth from US asked:

“[w]hat would happen if the buyer, claiming his rights under [Draft] article 42 required substitute goods and the seller, basing himself on [Draft] article 44, offered to remedy [by repair]?”⁵⁹

It seemed reasonable to the US delegation that the buyer's right to substitute goods subordinate to the seller's right to cure and they proposed an amendment to make this clear.⁶⁰ But the Conference, rejecting this proposal, adopted the final language of CISG Article 48(1) which makes the seller's right to cure a late or non-conforming fundamental breach dependent only on whether he can do so within a reasonable time without causing the buyer unreasonable inconvenience or uncertainty about reimbursement of expenses. By adoption of this language the question of whether the CISG places a serious limit on the seller's right to cure by giving the buyer the right to dictate the terms of the cure under Article 48 with a demand for substitute goods has been left open to debate.

Professor Honnold suggests that the question of whether a breach is fundamental should be decided in the light of all circumstances including the effect of a rightful offer to cure.⁶¹ He maintains that where “cure is feasible and an offer of cure can be expected, one cannot conclude that the breach is “fundamental”.”⁶² If this construction were correct, then there would be no fundamental breach to enable the buyer to demand performance by replacement under Article 46(2) in so far as the seller could cure. Similarly, this construction would bar the buyer from avoiding the contract under Article 49 (1). However, this construction does not seem to be correct, since it

⁵⁸ See, *United Nations Conference on Contracts for the International Sales of Goods* (Vienna, 10 March -11 April 1980), *Official Records*, New York, 1981, at p. 344.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.* at p. 114. “Revise the first sentence of paragraph (1) of article 44 to read as follows: (1) Unless the buyer has declared the contract avoided in accordance with article 45 and regardless of any right of the buyer under article 42 the seller may, even after the date for delivery, remedy”

⁶¹ See, Honnold, *Uniform Law for International Sales Under the 1980 United Nations Convention supra.*, note 1, at pp. 214-312.

⁶² *Ibid.* at p. 312.

renders the buyer's right to require substitute goods under Article virtually meaningless by restricting its scope of application to the few cases where repair is impossible. Such a reduction was certainly not in the mind of the drafters, who had originally dedicated all of Article 46 to the right to require substitute goods.⁶³

An opposite view has been taken by Professor Schlechtriem who contends that in the case of fundamental breach the seller's rights to cure should yield to the buyer's right to require substitute goods.⁶⁴ This view can be reinforced by the fact that pursuant to Article 77 of the CISG the buyer in choosing his remedy must observe the duty to mitigate losses.⁶⁵ Now if the seller can meet the buyer's expectations to the same degree both by repairing and by delivering substitute goods, then the decisive consideration will be costs and as a consequence, the buyer cannot demand substitute goods if the costs of disposing of the goods delivered and replacing them are higher than those of repair.

The buyer's remedies for breach of the contract under the CISG

Under the CISG the notion of breach of the contract covers all failures of a party to perform any of his obligations arising from the contract, a usage of trade or the CISG itself. This means that, unlike many civil law codifications, as well as English law

⁶³ See, Secretariat's Commentary, *United Nations Conference on Contracts for the International Sales of Goods* (Vienna, 10 March -11 April 1980), *Official Records*, I, New York, 1981, at p. 38-39; see also *United Nations Conference on Contracts for the International Sales of Goods* (Vienna, 10 March -11 April 1980), *Official Records*, II, New York, 1981, at p. 332-333.

⁶⁴ See, P. Schlechtriem, "The Seller's Obligations Under the United Nations Convention on Contracts for the International Sale of Goods", in Galston N.M.-Smit H. (Ed.), *International Sales: The United Nations Convention on Contracts for the International Sale of Goods* (New York: M. Bender, 1984), Ch. 6, pp. 6-29.

⁶⁵ See, however, H. Kastely, "The right to require performance in International Sales: Towards an International interpretation of the Vienna Convention" (1988) 63 *Washington Law Review* 607 . Professor Kastely refers to "the language of Article 77, the structure of the Convention, and the Convention's drafting history" and concludes that this article is applicable only to a damages claim and, therefore, it does not bar the buyer from choosing any of his remedial rights under the CISG.

which, distinguish between various types of violation of contract, the CISG, like US law, acknowledges only one notion of breach. Accordingly, contrary to many national laws, such as the Iranian, English and French systems, the CISG provides a unique and coherent system of remedies with many similarities to and just as many points of departure from, national remedial systems. Clearly, the method adopted by the CISG simplifies the law for the parties to understand and thereby promotes certainty among them.

The CISG contains two alternative remedial systems. In one, the exchange contemplated by the contract is completed despite the breach by the seller. The goods end up with the buyer and the seller receives the price, either because the seller performs his obligation to deliver (although defectively) or because the court orders him to deliver. Monetary damages⁶⁶ or a reduction in the contractual price⁶⁷ compensate the aggrieved buyer for ways in which the completed exchange falls short of that contemplated.

In the CISG's other scheme the exchange is not completed through avoidance of the contract by the aggrieved buyer with the consequence that the buyer does not end up with the seller's goods and the seller has no right to the price from the buyer. In other words, if the contract is avoided the contemplated exchange either will not occur or it will be undone, triggering remedial provisions very similar to the Article 2 remedies of the UCC that apply when goods are not accepted or acceptance is revoked.⁶⁸ Thus the buyer who avoids a contract governed by the CISG can escape a bad bargain or look for cover⁶⁹ or market price differential damages⁷⁰ to compensate for a lost favourable exchange.

Ibid., at pp. 620-621.

⁶⁶ For a case under the CISG in this respect: see *United Nations General Assembly*, A/CN.9/SER.C/ABSTRACTS/10 (16 August 1996) Case 141, pp. 10-11.

⁶⁷ CISG, Article 50. As to the importance of the remedy of the price reduction under this Article, see Peter Schlechtriem, "Some Observations on the United Nations Conventions on Contracts for the International Sale of Goods" in *The Frontiers of Liability* (Oxford University Press, 1994), vol. 2 (P. Birks, ed.) 29, 44-45.

⁶⁸ See pp. 61-79, ante.

⁶⁹ See CISG, Article 75.

⁷⁰ CISG, Article 76.

The key to the CISG's rules regarding avoidance is "fundamental breach." If the seller's failure to perform any of his obligation amounts to a fundamental breach, the buyer will have a right to avoid the contract.⁷¹ Subject to one exception,⁷² if the seller has not committed a fundamental breach, the aggrieved buyer may not avoid the contract. Accordingly, the role of the notion of "fundamental breach" concerning the aggrieved buyer to avoid under the CISG is almost similar to that of breach of an express warranty with a serious consequence for the buyer or breach of "condition" notion in English law under which the buyer may reject the goods.⁷³

The CISG defines "fundamental breach in terms of materiality and foreseeability of its consequences-that is the breach is "fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract," provided this result is foreseeable.⁷⁴ This was the case, for example, in one case, where an Italian manufacturer had agreed to produce 130 pairs of shoes in accordance with specifications provided by the German buyer to be used as a basis for further orders from him. At a trade fair, the producer displayed some shoes produced in conformity with those specifications and bearing the same trademark of which the buyer was the licensee. One day after the manufacturer refused to remove those shoes from the trade fair as demanded by the buyer, the latter advised the manufacturer by telex that he determined to discontinue the relationship and would not pay for the 130 sample shoes as they were no longer of any value to the buyer. The German court of appeal found the CISG was the applicable law of the contract, and held that the buyer had timely and effectively avoided the contract. The court argued that the seller's breach of the ancillary duty of preserving exclusivity constituted a fundamental breach of the contract under Article 25 of the CISG for it

⁷¹ CISG, Article 49(1)(a).

⁷² This exception is the CISG's *Nachfrist* provisions under Article 49(1)(b) which will be discussed latter in this chapter.

⁷³ See pp. 22-24, ante.

⁷⁴ See, CISG, Article 25

endangered the purpose of the contract to such a degree that, as was foreseeable to the manufacturer, the buyer had no more interest in the contract.⁷⁵

Whether or not the contract is avoided, the CISG, like the French system, allows an aggrieved buyer also to claim damages caused by the breach. But unlike the French and other civil law systems, the remedy of damages under the CISG is independent of any fault on the part of the seller. In other words, here the CISG follows the Anglo-US law approach whereby any objective breach by the seller to perform any of his obligation enables the buyer to apply for damages. This means that the buyer, unlike the civilian tradition, will unfortunately be deprived from recovering those damages which were not foreseeable at the time of the contract even if they are caused by the seller's intentional breach of the contract.⁷⁶

Specific performance and remedies where the buyer retains the goods

As mentioned above, under Article 49(1)(a) of the CISG, a fundamental breach by the seller provides the buyer with a right to avoid the contract. Like rejection of the goods for breach of condition under English law, avoidance terminates the obligation to exchange goods for price and triggers the aggrieved buyer's right to cover or market-price damages. There is, however, no provision in the CISG to require an aggrieved buyer to avoid the contract where a fundamental breach has occurred. This means, that even in the case of fundamental breach the buyer may opt for the set of remedies that contemplate completion of the basic exchange.

Where the goods are in possession of the buyer, non-avoidance produces results similar to those of English sale law where the buyer elects to treat the breach of the condition as a breach of warranty by not rejecting of the goods,⁷⁷ and to those under Article 2 of the UCC where the buyer has accepted and not revoked, that is the seller

⁷⁵ See, *United Nations General Assembly*, A/CN.9/SER.C/ABSTRACTS/1 (17 May 1993) Case 1 pp. 2-3; *Uniform Law Review*, 1991, I, 382.

⁷⁶ See J.D. Feltham, "The United Nations Convention on Contract for the International Sale of Goods", (1981) *Journal of Business Law* 346, at pp. 358-359.

⁷⁷ See English Sale of Goods Act 1979, Section 11(4). See further, pp. 24-25, ante.

has a right to the price,⁷⁸ the buyer keeps the goods and recovers damages for the damages caused by the breach.⁷⁹ However, under the CISG, like various civilian legal systems, the non-avoiding buyer who receives non-conforming goods has certain remedies not available under Anglo-US law. For instance, the buyer may demand substitute goods when non-conformity constitutes a fundamental breach.⁸⁰ In addition, the buyer may require the seller to repair any lack of conformity unless that would be unreasonable in the circumstances surrounding the case.⁸¹ Finally, pursuant to Article 50 of the CISG, a non-avoiding buyer may reduce the price in proportion to the loss in value caused by a lack of conformity in the goods.⁸² In 1989, for example, an Italian seller claimed the balance of amounts due under the contract for the sale of shoes to the German buyer. The German buyer counterclaimed a price reduction for lack of conformity in the goods with the specification provided in the contract. Referring to the German private international law, the court found that the CISG as part of Italian law was applicable to the contract and held that the buyer, pursuant to Article 50 of CISG, was entitled to reduce the price of the goods in the same proportion as the value that the goods actually delivered had at the time of delivery bore to the value which conforming goods would have had at that time.⁸³

⁷⁸ See, CISG, Article 62; UCC, Section 2-709(1)(a).

⁷⁹ For the full provisions of Article 74 of the CISG, see Appendix V.

⁸⁰ See CISG, Article 46(2).

⁸¹ See CISG, Article 46(3).

Under Article 2 of the UCC, the court may issue an order instructing the seller to remedy a non-conformity in the goods delivered where the circumstances justify specific performance under section 2-716(1). See, e.g., *Colorado-Ute Elec. Ass's v. Envirotech Corp.*, 524 F. Supp. 1152 (D.colo.1981). The court's power to order specific performance may also include the power to require delivery of substitute goods if, for instance, the seller was the sole source of supply, and the goods which he had delivered could not be repaired. Unlike the remedies provided in Article 46(2) and (3) of the CISG, however, an order requiring the repair or delivery of substitute goods under Article 2 of the UCC is presumably limited to situations falling within section 2-716(1) that is, "where the goods are unique or in other proper circumstances."

⁸² For a detailed discussion of the price reduction remedy under Article 50: see Bergsten & Miller, "The Remedy of Reduction of Price" (1979) 27 *American Journal of Comparative Law* 255.

⁸³ *United Nations General Assembly*, A/CN.9/SER.C/ABSTRACTS/3 (24 May 1994) Case 46 pp. 2-3;

An aggrieved buyer's non-avoidance option under Article 46(1) of the CISG entitles him to require the seller to perform or to complete the performance of any of his obligations undertaken under the contract. This means that irrespective of whether the seller has failed to deliver or he has delivered non-conforming goods, the buyer may avail himself of the non-avoidance scheme of remedies under which goods are to be exchanged for a price.

Despite the broad language of Article 46(1), an aggrieved buyer's right to performance is subject to several significant limitations. The first major limitation on the buyer's right to compel the seller to perform his obligation has been imposed by the provision of Article 46(1) itself. This provision, unlike French law,⁸⁴ states that the right to performance cannot be enforced if the buyer has resorted to an inconsistent alternative remedy. Accordingly, the buyer who avoids the contract under Article 49 will lose his right to require performance by the seller of his obligation, in which case the buyer may seek only damages.⁸⁵ Similarly, the buyer who has "reduced the price" under Article 50 cannot avail himself of the remedy of specific performance.

The second important limitation to the buyer's right of specific performance derives from Article 28 of the CISG which states:

"a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention."

The word "would" in this Article indicates that the court must order specific performance only if the domestic law of the forum court requires an order of specific performance in a similar contract of sale.⁸⁶ This means that the court may reject the

Referred to by Piltz in *Neue Juristische Wochenschrift (NJW)* 1994, p. 1101.

⁸⁴ See p. 90, ante.

⁸⁵ See Ziegel, *The Remedial Provisions in the Vienna Sales Convention: Some Common Law Perspectives*, in *International Sales: The United Nations Conventions on Contracts for the International Sales of Goods* (1984) at p. 9-9.

⁸⁶ The CISG's various limitations on the right to performance would apply even if the court's domestic law would allow specific performance: see J. Honnold, *Uniform Law for International Sales Under the 1980 United Nations Convention*, *supra.*, note 1 § 195, at p. 225.

buyer's application under the CISG to obtain specific performance, even if it is authorised (but not required) under its domestic law to order specific performance of a similar contract. The negative phrasing of Article 28, on the other hand, suggests that the court, under the CISG, has discretion to issue an order compelling the breaching seller to perform specifically the contract even if the domestic law of the forum court does not require an order of specific performance in similar instances.⁸⁷ In fact, the purpose of the drafters in adopting Article 28's provision was to avoid forcing national courts to issue orders, which were not authorised or were considered unwise under domestic laws. Accordingly, the outcome of an action to obtain a decree of specific relief by the buyer under the CISG will depend not only on the geographical location of the court before which the action is being brought but also on the discretionary view of an individual trial judge who considers the case. Regretfully, both of these factors are inconsistent with the declared goal of the CISG to establish uniformity and certainty in the law governing international sales.

In addition to the express limitations within Articles 46 and 28, Article 7 implicitly requires that the right to performance be exercised in good faith. Under this Article in interpreting the CISG, regard should be had to "the observance of good faith in international trade."⁸⁸ Although, the principle of good faith is not clearly defined and its placement in the CISG is problematic,⁸⁹ it is appropriate to interpret the buyer's right to performance granted in Article 46 consistently with the general obligation of good faith so as to prevent him from inflicting undue pain or punishment on the breaching party. This may prove to be a significant limitation where, for example, the buyer delays an action for performance in order to speculate on the market, or where he pursues specific performance for the purpose of harassing

⁸⁷ Gonzalez, "Remedies Under the U.N. Convention for the International Sale of Goods" (1984) 2 *International Tax & Business Law*, 79 at p. 97. But see J. Honnold, *Uniform Law for International Sales Under the 1980 United Nations Convention*, *supra.*, note 1 § 195, at p. 225.

⁸⁸ For the full provisions of Article 7 of the Vienna CISG, see Appendix V.

⁸⁹ See Eörsi, "General Provisions" in *International Sales: The United Nations Convention on Contracts for the International Sale of Goods* (1984) at pp. 2-1, 2-6 to 2-8.

the breaching seller or in circumstances where specific performance will be particularly onerous to the latter.⁹⁰

The buyer's option to avoid the contract

As mentioned above, under Article 49(1) of the CISG, the buyer has a right to avoid the contract whenever the seller commits a fundamental breach⁹¹ or fails to deliver in response to a *Nachfrist* ultimatum under Article 47.⁹²

Nachfrist is a procedure through which an aggrieved party can make the other side's failure to perform its basic obligations by a particular date the equivalent of fundamental breach.⁹³ For example, in a contract for the sale of nine used printing machines the German seller agreed to deliver upon two shipments, the first including six and the second three machines to the buyer in Egypt. Concerning the containing three machines, after the seller's failure to deliver on the contractual date, the buyer fixed a final period of two weeks of delivery. The seller having declined to deliver within that period, offered shortly afterwards to deliver on a new contractual term namely, against advanced payment of the price. The buyer refused this and declared the contract avoided as far as the missing machines were concerned. The court found that the CISG was applicable as both parties had their places of business in different CISG contracting States, and argued that the seller had breached the contract by not delivering the machines within the time fixed by the contract (Article 33(b), thus giving the buyer the right to fix an additional period of time under Articles 49(1)(b) and to declare the contract avoided after the seller's failure to deliver within the

⁹⁰ See J. Honnold, *Uniform Law for International Sales Under the 1980 United Nations Convention*, *supra.*, note 1 § 95, at p. 125, § 193, at pp. 222-23, § 285, at p. 302.

⁹¹ See, for example, *United Nations General Assembly*, A/CN.9/SER.C/ABSTRACTS/3 (24 May 1994) Case 50 pp. 4-5.

⁹² See, J.D. Feltham, "The United Nations Convention on Contract for the International Sale of Goods", (1981) *Journal of Business Law* 346, at 355-356

⁹³ See, F.M.B. Reynolds Q.C., "A Note of Caution" in *The Frontiers of Liability* (Oxford University Press, 1994), vol.2 (P. Birks ed.) 18, 22.

additional period.⁹⁴ On the other hand, where the German buyer failed to take delivery of the goods alleging that the Italian seller effected delivery only after expiry of the delivery period agreed between the parties, the German court applying CISG as the law of the seller's country and awarded the seller the full price, including interest at the statutory rate in Italy plus additional interest as damages. The court argued that even if, as alleged by the buyer, delivery took place after expiry of the contractual period, the buyer did not effectively avoid the contract by refusing acceptance of the goods without having fixed an additional period under Article 49(1)(b) within which the seller had to deliver.⁹⁵ In accordance with the CISG and the cases decided under its provisions, in the absence of a contrary agreement by the parties concerned, delay in delivery of the goods in itself, unlike some national systems, does not constitute fundamental breach of the contract without setting of an additional period within which the seller had to deliver. Only the seller's failure to deliver within this additional period entitles the buyer to avoid the contract and ask for damages caused by the breach.

Avoidance relieves both parties of executory performance obligations.⁹⁶ This means that the buyer, like the Iranian system, in such instances, is entitled to recover whatever amounts were "paid under the contract"⁹⁷ from the seller, whilst, he has an obligation to return to the latter the goods⁹⁸ and "all benefits which he has derived from the goods or part of them..."⁹⁹ Thus in the case of delivery of the goods, the avoiding buyer must preserve¹⁰⁰ and return them, although he may retain them until

⁹⁴ See, *United Nations General Assembly*, A/CN.9/SER.C/ABSTRACTS/10 (16 August 1996) Case 136, pp. 6-7.

⁹⁵ See *United Nations General Assembly*, A/CN.9/SER.C/ABSTRACTS/1 (17 May 1993) Case 7, p. 5. See further, *United Nations General Assembly*, A/CN.9/SER.C/ABSTRACTS/6 (10 April 1995) Case 79, p. 2.

⁹⁶ See CISG, Article 81(1).

⁹⁷ See CISG, Article 81(2). An avoiding buyer can also claim interest over the price from the date of payment under Article 84(1).

⁹⁸ See CISG, Article 81(2).

⁹⁹ See CISG, Article 84(2).

¹⁰⁰ See Articles 86-88 of the CISG which detail the avoiding buyer's obligation to preserve the goods.

reimbursed for reasonable expenses of preservation.¹⁰¹ Indeed, subject to certain broad exceptions,¹⁰² the buyer loses the right to avoid where he is unable to return the goods “substantially in the condition” in which he received them. Accordingly, in one case the defendant, a German buyer, refused to pay the purchase price asserting that the goods delivered by the plaintiff, an Italian seller, were not in conformity with the contractual specifications. It was held that the defendant had lost the right to declare the contract avoided since by reselling the goods to a third party he made restitution of the goods to the plaintiff impossible.

The buyer will lose the right to avoid if he fails to send a notice of avoidance within a reasonable time after he knew or should have known of the breach.¹⁰³ Similarly, the buyer cannot avail himself of the right to avoid the contract for non-conformity in the goods delivered unless he does so after the expiry of any additional period set by him in accordance with paragraph (1) of Article 47, or after the seller states that he will not perform his obligations to remedy the non-conformity within such an additional period.¹⁰⁴ The same rule applies, i.e., the buyer cannot exercise his right to avoid the contract where he fails to do so after expiration of the period of time fixed by the seller for the performance of his obligations in accordance with Article 48(2) or after the buyer himself declares that he will not accept performance within that period.¹⁰⁵ Furthermore, the buyer will lose his right to avoid the sale on the basis of non-conformity in the goods unless he complies with Article 39’s requirement by sending notice to the seller “specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it”¹⁰⁶ or at the latest, within two years from the date of delivery unless the

¹⁰¹ See CISG, Article 86(1).

¹⁰² See CISG, Article 82 for those exceptional cases where The buyer retains the right to avoid despite his inability to restore the goods to the seller.

¹⁰³ CISG, Article 49(2)(b)(i).

¹⁰⁴ CISG, Article 49(2)(b)(ii).

¹⁰⁵ CISG, Article 49(2)(b)(iii).

¹⁰⁶ See, for example, *United Nations General Assembly*, A/CN.9/SER.C/ABSTRACTS/6 (10 April 1995) Case 81, p. 3; *United Nations General Assembly*, A/CN.9/SER.C/ABSTRACTS/7 (12 July

seller clearly waives his right or is estopped by his behaviour to raise that defence. In 1994, for example, a German buyer concluded a contract for the purchase of rolled metal which was found to be defective. The buyer sent to the seller notice of lack of conformity of the goods with the contract specification, but the seller refused to pay damages, alleging that the notice was not timely. It was found that the buyer had not complied with the requirements of Articles 38 and 39 of the CISG in examining of the goods and giving notice of non-conformity to the seller. Moreover, the buyer's allegation that the seller had waived his right to raise the defence that notice of non-conformity was not timely given, was rejected because there was no clear evidence to indicate that the seller waived this right. However, after receiving the notice, the seller had continued to ask the buyer to provide information on the status of the complaint and had pursued negotiations with a view to reach a settlement. This behaviour of the seller led the buyer to believe that he would not raise the defence of untimely notice and, therefore, it was held that the seller was estopped from raising that defence. It was argued that, whilst estoppel was not expressly settled by CISG, it formed a general principle underlying CISG ("*venire contra factum proprium*"); Articles 7(2), 16(2)(b) and 29(2) of CISG).¹⁰⁷

Successful avoidance of the contract by an aggrieved buyer entitles him to damages measured by the market price of the goods or the price paid in a substitute transaction ("cover").¹⁰⁸

Where a seller makes a partially non-conforming or insufficient delivery, the buyer, following Article 51(1) of the CISG, has a right to "partial avoidance" only if (a) the defects in the non-conforming goods, or the delay in the missing goods constitute a fundamental breach with respect to those goods or (b) the seller failed to deliver missing goods within the time fixed in a *Nachfrist* notice under Article 47.¹⁰⁹

1995) Case 94, p. 5.

¹⁰⁷ See *United Nations General Assembly*, A/CN.9/SER.C/ABSTRACTS/7 (12 July 1995) Case 94, p. 5.

¹⁰⁸ See CISG, Articles 75 and 76.

¹⁰⁹ See J. Honnold, *Uniform Law for International Sales Under the 1980 United Nations Convention*, *supra.*, note 1, at pp. 328-30.

In other words, while Article 49(1) permits the buyer to avoid the whole sale only if the seller has committed a fundamental breach or has failed to deliver within the time fixed in a *Nachfrist* notice, Article 51(1) of the CISG extends the scope of the application of this rule to cover a non-conforming or missing portion of a delivery. The buyer's partial avoidance eliminates his obligation to pay for the missing or defective goods¹¹⁰ and allows him to claim cover or market-price damages therefor.¹¹¹ This rule, which apparently applies to deliveries under both instalment and single delivery contracts, resembles to the provisions of Article 2 of the UCC under which the buyer is allowed to reject or revoke acceptance as to "commercial units" of goods¹¹² and to recover from the seller market-price or cover damages for missing portion of a delivery.¹¹³ On the other hand, immaterial non-conformities in a portion of delivery do not allow the buyer to reject or withhold payment for a non-conforming portion, although he may invoke his non-avoidance remedies, other than a claim for substitute delivery,¹¹⁴ with respect to a non-conforming portion (for example, he may demand the seller to repair¹¹⁵ or he may claim damages¹¹⁶). In contrast with these provisions, a buyer in a single delivery contract, under section 2-601 of the UCC, has a theoretical right to reject any "commercial unit" of tendered goods even if the seller has committed only an immaterial breach.

Article 51(2) of the CISG allows the buyer to avoid the contract "in its entirety" only if the seller's default for insufficient or partially non-conforming delivery "amounts to a fundamental breach of the contract." At first glance, it appears that the provision of this Article is redundant for, Article 49(1) clarifies that, absent the use of the *Nachfrist* procedure, the buyer may avoid the contract only if the seller's breach

¹¹⁰ See CISG, Article 81.

¹¹¹ See CISG, Articles 75 and 76.

¹¹² See UCC, Sections 2-601(c) and 2-608(1).

¹¹³ See UCC, Section 2-711(1).

¹¹⁴ Since this remedy also is available only if the seller committed fundamental breach. See CISG, Article, 46(2).

¹¹⁵ See CISG, Article 46(3)

¹¹⁶ See CISG, Articles 45(1)(b) and 74.

is fundamental. Nothing in Article 49(1) suggests that this rule does not apply when the seller's breach related to insufficient or non-conforming delivery. Nonetheless, Article 51(2) is not mere verbiage and, as Professor Honnold notes one of the purpose of this article is:

“[t]o make clear that paragraph (1) does not force the buyer to sort out the non-conforming goods for separate handling. The buyer may “avoid” (reject) as to the entire delivery if the breach as to part causes detriment that is so substantial as to constitute a “fundamental breach” of the contract as a whole.”¹¹⁷

Moreover, Article 51(2)'s provision in allowing an aggrieved buyer to avoid the entire contract “only” if the failure constitutes fundamental breach of the contract, entails that the buyer cannot use the *Nachfrist* procedure to create grounds for avoiding the contract in its entirety where the seller fails to deliver a trivial portion of the goods. The unavailability of *Nachfrist* whenever the seller has made partial delivery is troubling. Suppose, that the seller delivers only 20 of the 500 sacks of wheat that he has sold, but indicates that he will deliver the balance in future. In accordance with paragraph (1) of Article 51¹¹⁸ the buyer is bound to accept the portion of the goods delivered, whilst paragraph (2) of this Article deprives him of the advantages of the *Nachfrist* procedure. This means that the buyer has no choice but to wait until it is sure that the seller's delay in completing delivery amounts to a fundamental breach before he can avoid the entire contract.¹¹⁹

Concerning instalment contracts, Article 73(1) of the CISG permits the buyer to avoid the contract “with respect to [an] instalment” if the seller's default amounts to “fundamental breach of contract with respect to that instalment.”¹²⁰ The purpose of this provision like that of Article 51(1) is to allow an aggrieved party to treat each instalment of an instalment contract as a severable contract for the purposes of avoidance. This means that the buyer may avoid the contract with respect to an

¹¹⁷ See J. Honnold, *Uniform Law for International Sales Under the 1980 United Nations Convention*, *supra.*, note 1 at p. 330.

¹¹⁸ For the full provisions of Article 51 of the CISG, see Appendix V.

¹¹⁹ Of course, the buyer may use the *Nachfrist* procedure to create a ground for avoidance of the contract with respect of the undelivered portion of the goods. See CISG, Article 51.

¹²⁰ For the full provisions of Article 73 of the CISG, see Appendix V.

instalment where the missing or non-conforming goods amount to fundamental breach of that instalment even if the seller's default would not constitute fundamental breach of the entire contract.

Thus a buyer who receives an instalment delivery containing non-conforming goods or a shortfall in their quantity may have three avoidance options. Following Article 51(1), he may avoid the contract with respect to the missing or non-conforming goods provided the seller's default "results in such detriment ... as substantially to deprive [the buyer] of what he is entitled to expect" as to those goods. Under Article 73(1), the buyer is entitled to avoid the instalment if the delay in full delivery or the non-conformity in the goods amounts to a fundamental breach with respect to the instalment. Finally, pursuant to Article 49(1), the buyer can avoid the entire contract if the seller's breach is fundamental as to the entire contract.

Under Article 73(2) if default with respect to any instalment gives the aggrieved buyer "good grounds to conclude that a fundamental breach of contract will occur with respect to future instalments," he "may declare the contract avoided for the future" provided he does so "within a reasonable time."¹²¹ But this Article does not state as from when the reasonable time begins to run. A comment to a draft of the CISG suggests that the time runs from the seller's "failure to perform."¹²² Where the non-conformity could not be discovered immediately, however, it would be preferable to measure reasonableness from the time when the buyer detected or should have detected the non-conformity.¹²³ Neither of these approaches, nevertheless, is suitable if the past defaults involves non-delivery¹²⁴ or if "good grounds" to anticipate a fundamental breach as to future instalments under Article

¹²¹ This provision represents a marked change from the substantive standards and procedures that the CISG applies to anticipatory breaches in other contexts. See J. Honnold, *Uniform Law for International Sales Under the 1980 United Nations Convention*, *supra.*, note 1 p. 406.

¹²² See, Secretariat's Commentary, *United Nations Conference on Contracts for the International Sales of Goods* (Vienna, 10 March -11 April 1980), *Official Records*, I, New York, 1981, p. 54.

¹²³ See CISG, Article 39(1).

¹²⁴ See J. Honnold, *Uniform Law for International Sales Under the 1980 United Nations Convention*, *supra.*, note 1, n.3 at p. 330.

73(2) arose only after a series of non-conforming instalments.¹²⁵ Perhaps the best solution is to measure reasonableness from the time the aggrieved buyer acquired ‘good grounds’ to anticipate serious problems with future instalments. Although such a standard is very uncertain, it offers the only hope for dealing with variety of circumstances that will arise.

Another point with respect of Article 73(2) is that it deals only with avoidance to future performance and, accordingly, does not address avoidance of an entire instalment contract. If the seller’s breach in a completed delivery is fundamental with regard to that delivery and gives the buyer good grounds to anticipate a fundamental breach as to future instalments, however, the past delivery can be avoided under Article 73(1) and the future instalments can be avoided under Article 73(2). Except for this situation, a party who wishes to avoid an entire instalment contract must establish that defaults as to past deliveries constitute a fundamental breach of the entire contract,¹²⁶ or that the party can avoid under the general anticipatory provisions of Articles 71 and 72.

As pointed out above, the key to the CISG’s system of remedies is avoidance and non-avoidance of the contract and the key to the avoidance machinery is “fundamental breach.” Article 25 of the CISG defines fundamental breach as a breach that:

“results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.”

¹²⁵ Article 73(2) speaks of “one party’s failure to perform any of his obligation in respect of *any* instalment” (emphasis added). This language permits the aggrieved party to treat defaults in several instalment as cumulative. See Secretariat’s Commentary, *United Nations Conference on Contracts for the International Sales of Goods* (Vienna, 10 March -11 April 1980), *Official Records*, I, New York, 1981, at p. 54. Compare Official Comment 6 to UCC, Section 2-612 (“defects in prior instalment are cumulative in effect, so that acceptance does not wash out the defect ‘waived’”)

¹²⁶ See also CISG, Article 49(1)(a).

These provisions have already generated issues among the commentators of the CISG.¹²⁷ Professor Ziegel argues that Article 25's definition of fundamental breach may require that the aggrieved buyer's loss be more than material.¹²⁸ If this argument is accepted, a breach that satisfied section 2-608(1)¹²⁹ of the UCC material breach standard "substantial impairment of value" might not be "fundamental" within the meaning of the CISG. The provisions of Articles 71 and 72, which deal with anticipatory non-performance under the CISG, may support the foregoing argument. These Articles distinguish between a threat of a fundamental breach and a threatened failure to perform a "substantial part" of a party's obligations. The latter event allows the other party to suspend his performance, whereas the former one grants him a more radical power to avoid the contract. This distinction suggests that a "substantial" breach does not necessarily amounts to a "fundamental" breach.

A further problem under the provisions of Article 25 concerns the correct time for determining the breaching seller's foreseeability of the consequence of his breach. The Article does not state whether foreseeability should be measured at the time of the conclusion of the contract or at the time of breach. The legislative history of this Article reveals that the omission was intentional, designed to permit courts to decide the issue on a case by case basis.¹³⁰ Professor Honnold suggests, consistently with this history, that the wilfulness of default is a factor for the decision - maker to

¹²⁷ See, e.g., Will, "Fundamental Breach" in Bianca-Bonel, *Commentary on the International Sales Law* (1987) at pp. 208-12. Professor Will notes that the term "fundamental breach" is the CISG innovation, which as a prerequisite for avoiding a contract has "no familiar parentage in other jurisdictions." *Ibid.*

¹²⁸ See Ziegel, *The Remedial Provisions in the Vienna Sales Convention: some Common Law perspectives*, in *International Sales: The United Nations Convention on Contracts for the International Sale of Goods* (1984), § 9.03[2][a], [b].

¹²⁹ Section 2-608(1) confers an aggrieved buyer a right to revoke his acceptance of non-conforming goods, an action equivalent to avoidance under the CISG, if the non-conformity "substantially impairs [their] value to him."

¹³⁰ See Ziegel, *The Remedial Provisions in the Vienna Sales Convention: some Common Law perspectives*, in *International Sales: The United Nations Convention on Contracts for the International Sale of Goods* (1984), § 9.03[d] at 9-19.

consider- i.e., foreseeability should be determined at the time of wilful breach. Where serious loss was unavoidable by the time it became foreseeable to the breaching party, on the other hand, Professor Honnold suggests that the breach should not be considered fundamental.

Not everybody shares Professor Honnold's view concerning foreseeability. According to Professor Ziegel, for example, foreseeability should always be measured as of the time of the contract formation.¹³¹ Referring to the provisions of Article 74, which limit an aggrieved buyer's damages to losses foreseeable "at the time of contracting", Professor Ziegel argues that it would be "anomalous" if the buyer could take the radical step of avoiding the contract on the ground of consequences for which he could not even recover damages.¹³² He contends that consequences foreseeable at the time of breach, but not at the time of contract formation are too remote to justify avoidance.¹³³

The UCC, however, contains a precedent for the "anomaly" feared by Professor Ziegel. Like the CISG, section 2-715(2)(a) of the UCC limits consequential damages to losses foreseeable at the time of contract, whilst section 2-608(1) allows the buyer to revoke acceptance of non-conforming goods, an action equivalent to avoidance under the CISG, if the non-conformity "substantially impairs [their] value to him." The Official Comment 2 of section 2-608 describes the standard as follows:

"[T]he test is not what the seller had reason to know at the time of contracting; the question is whether the non-conformity is such as will in fact cause a substantial impairment of value to the buyer though the seller had no advance knowledge as to the buyer's particular circumstances."

Accordingly, the US sales law expressly rejects the notion that the substantial impairment required for revocation of acceptance must have been foreseeable by the

¹³¹ See Ziegel, *The Remedial Provisions in the Vienna Sales Convention: some Common Law perspectives*, in *International Sales: The United Nations Convention on Contracts for the International Sale of Goods* (1984), § 9.03[d] at pp. 9-19 to 9-20.

¹³² *Ibid.*, § 9.03[d] at 9-20.

¹³³ *Ibid.*

seller at the time of formation of the contract, and it does so even though the seller is liable in damages only for losses foreseeable at that time.

Professor Ziegel's alleged 'anomaly,' furthermore disappears upon considering the different purposes of the foreseeability requirements in Articles 25 and 74 of the CISG. The foreseeability limitation on damages is designed to limit the financial exposure of the parties to a sale contract by excluding liability for remote consequences. The purpose of the foreseeability requirement in the definition of fundamental breach, in contrast, is to limit avoidance to appropriate circumstances. It may make sense to provide that the breaching seller is not responsible in damages for losses that become foreseeable only after conclusion of the contract, when the contractual terms cannot unilaterally be adjusted to account for newly-discovered risk. This logic, however, does not require that an aggrieved buyer be forced to maintain a contractual relationship where the seller should have known, at the time of the wilful breach, that his action would cause substantial hardship to the buyer.

Damages upon avoidance of the contract

The buyer who successfully avoids a sale contract may seek damages which he has sustained as a consequence of the seller's breach, provided that they were foreseeable by the latter at the contracting time.¹³⁴ In accordance with Article 75 of the CISG, such damages are equal to the difference between the contract price and the price in the substitute transaction as well as incidental and/or consequential damages under Article 74.¹³⁵

The buyer may avail himself of the cover remedy under Article 75 only if the cover purchase was made in a reasonable manner; that is, he has purchased the substitute goods at the lowest possible price in the circumstances. Where, for example, a German buyer avoided the contract with a Russian seller as a consequence of the latter's failure to deliver the goods sold, the Tribunal of

¹³⁴ For the full provisions of this Article, see Appendix V.

¹³⁵ For the full provisions of Article 75 of the CISG, see Appendix V.

International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry in consistent with the provisions of Article 74 CISG awarded the buyer damages on the basis of the difference between the contract price and the replacement purchase price, since the seller failed to establish that the buyer could purchase the goods at a lower price when making the second purchase in replacement of the first.¹³⁶ Thus, the substitute purchase need not be on identical terms of sale concerning such matters as quantity, manner of payment or time of delivery as long as the transaction that was in fact in substitution for the transaction was avoided.

Similarly, the buyer may invoke the remedial provision of Article 75 only if he has purchased the substitute goods within a reasonable time after avoidance of the contract with the seller. Hence, the “reasonable time” starts to run from the moment when the buyer declares the contract avoided.

The buyer’s right to claim damages under Article 75 appears almost indistinguishable from the one under section 2-712 of the UCC. But Article 75 does not specify the adjustment mentioned in section 2-712(2) for expenses saved by the aggrieved buyer claiming damages as a result of breach. However, equitable considerations require one to construe the phrase “price in the substitute transaction” to permit the same adjustment under Article 75, given that increased transportation costs and similar items of extra expense associated with a substitute transaction would constitute losses suffered “as a consequence of breach” and thus recoverable under Article 74 of the CISG.

It should be noted that the buyer is not bound to wait a reasonable period of time under Article 75 in order to recover cover damages from the seller. He has an option to claim damages immediately after they are accrued in which case the damages will be calculated on the basis of the difference between the contract price and the market price at the time of avoidance under Article 76, and, if applicable, on the basis of incidental and consequential damages under Article 74. The same remedy is

¹³⁶ See *United Nations General Assembly*, A/CN.9/SER.C/ABSTRACTS/10 (16 August 1996) pp. 9-10.

available where the buyer fails to purchase substitute goods in a reasonable manner or within a reasonable time after avoidance, i.e., he has to claim damages under Articles 76 and 74. The buyer who has failed to avail himself of the cover remedy, however, may be responsible for breach of the duty to take measures to mitigate the loss.¹³⁷

Article 76(1) of the CISG allows an injured buyer who has not entered into a substitute transaction to recover damages measured by “the difference between the contractual price and the current (i.e., market) price” as well as any incidental and/or consequential damages resulted from the seller’s breach. The market-price damage under this Article is generally measured “at the time of avoidance”, unless the aggrieved buyer avoids the contract after “taking over the goods” in which case the reference point is “the time of such taking over.” The latter alternative prevents an avoiding buyer who has received delivery from manipulating the time of avoidance in order to increase the seller’s liability.¹³⁸

As to the place where the current price is to be measured, Article 76(2) refers to “the place where delivery of the goods should have been made,” or alternatively “if there is no current price at that place,” then at a reasonable substitute location, “making due allowance for differences in the cost of transporting the goods.” Sections 2-708(1) and 2-713(2) of the UCC point to the same place for measuring market-price damages, unless the aggrieved buyer has rejected or revoked acceptance after the goods arrived in which case in accordance with section 2-713(2) of the UCC the market-price damages will be determined at the place of their arrival. Like the Iranian Civil Code, the UK Sale of Goods Act 1979, however, does not specify the place where the buyer’s market-price damages is to be determined.

The buyer’s remedies in the case of non-avoidance of the sale

¹³⁷ See CISG, Article 77.

¹³⁸ See V. Knapp, “Damages” in Bianca-Bonnel, *Commentary on the International Sales Law*, (1987) at p. 556.

There are some instances in which, despite the seller's breach, the contract is not avoided either because the breach is not fundamental and the *Nachfrist* procedure has not been used to create grounds for avoidance, or because, notwithstanding the breach being fundamental, the aggrieved buyer chooses not to avoid the contract. In such instances, the buyer may pursue his "non-avoidance" remedies if he complies with certain procedure under the CISG.

In the case of delivery of non-conforming goods, for example, the buyer under Article 39 of the CISG "loses the right to rely" on the lack of conformity if he fails to give "notice to the seller specifying the nature of the lack of conformity",¹³⁹ unless, in accordance to Article 40, "lack of conformity relates to facts of which he [the seller] knew or could not have been unaware and which he did not disclose to the buyer." In a series of contracts for the sale of goods on F.O.B. terms, for example, the buyer disputed, both prior to shipment and upon arrival, the conformity of the goods covered under one of the contracts with certain contract specifications. The buyer treated the goods in order to make them more saleable and sold them at a loss. The seller claimed full payment of the purchase price, and the buyer in his counterclaim demanded compensation from the seller for the damages caused by delivering of the non-conforming goods with the contract specifications. The arbitral tribunal, applying the CISG, found that the buyer complied with the requirements of the CISG to examine the goods properly (Art. 38(1)) and to notify the seller accordingly (Art. 39(1)). Following Article 40 of the CISG, the tribunal held that the seller at any rate would not be entitled to raise the objection of the buyer's failure to comply with the requirements of Articles 38 and 39 of CISG for the reason that the seller knew or could not have been unaware of the non-conformity of the goods with the contract specifications.¹⁴⁰ The notice must be within a shorter time of (i) "a reasonable time after [the buyer] has discovered [the non-conformity] or ought to have discovered it"¹⁴¹ and (ii) two years from the date of delivery to the buyer unless the two years

¹³⁹ See, e.g., *United Nations General Assembly*, A/CN.9/SER.C/ABSTRACTS/3 (24 May 1994) Case 48, pp. 3-4; *United Nations General Assembly*, A/CN.9/SER.C/ABSTRACTS/6 (10 April 1995) p. 3.

¹⁴⁰ *United Nations General Assembly*, A/CN.9/SER.C/ABSTRACTS/3 (24 May 1994) Case 45 p. 2.

¹⁴¹ See CISG, Article 39(1). The time when the buyer ought to discover non-conformities in the goods

limitation is “inconsistent with a contractual period of guarantee.”¹⁴² Furthermore, where the buyer alleges breach of the warranties against a third party’s claims of ownership (Article 41) or infringement of any right or claim of a third party based on industrial property or other intellectual property (Article 42), the CISG requires notice “specifying the right or claim of the third party”,¹⁴³ unless the seller was aware of the third party’s right or claim and knew its “nature.”¹⁴⁴

An aggrieved buyer’s compliance with these procedures entitles him to non-avoidance remedies where for the reasons mentioned above the contract is not avoided.¹⁴⁵ The aggrieved buyer’s remedies other than damages i.e., his right to specific performance, substitute goods, repair, or reductions in price have previously been described. To the extent these remedies do not fully protect his expectation under the contract, Article 74 of the CISG authorises recovery of damages measured by “the loss, including loss of profit, suffered ... as a consequence of breach.”¹⁴⁶ Damages under this provision, which are also available where the buyer has avoided the contract, are subject to familiar common law limitations involving foreseeability¹⁴⁷ and mitigation of damages.¹⁴⁸ These limitations are applicable even if the breach is caused by the seller’s fraud. This is unfortunate, since it makes sense to protect the parties against an unpredictable loss caused by their respective incidental breach, but this logic is not relevant where the breach by either of the parties is caused by his fraud. Obviously, the seller does not wilfully breach any of his obligations unless he can gain from the breach and therefore the law should hold

will be influenced by Article 38, which governs the buyer’s obligation to examine the goods. See J. Honnold, *Uniform Law for International Sales Under the 1980 United Nations Convention*, *supra.*, note 1, at p. 281.

¹⁴² CISG, Article 39(2).

¹⁴³ CISG, Article 43(1).

¹⁴⁴ *Ibid.*, Article 43(2).

¹⁴⁵ See pp. 176-177, *ante.*

¹⁴⁶ For the full text of Article 74, see Appendix V.

¹⁴⁷ *Ibid.* See further, Barry Nicholas, “The Vienna Convention on International Sales Law” (1989) 105 *Law Quarterly Review* 201, 230.

¹⁴⁸ CISG, Article 77.

him responsible for the consequence of his breach even if it was unforeseeable before the breach. This means that the CISG's limitations on the aggrieved buyer's right to recover full damages caused by the seller's intentional breach has but the effect of allowing the breaching party to gain at the expense of the buyer. Clearly, this approach discourages the seller from performing his obligations when he can gain from his breach and as such it is inconsistent with both the CISG's principle of good faith which is to be observed by the parties and its fundamental goal in maintaining the contract between them.

PART 2

Chapter 1

The seller's obligation as to the quality of the goods under English Law

Introduction

In contrast with the civilian systems under consideration, the Sale of Goods Act 1979 makes a misleading distinction between implied terms concerning quality of the goods on the one hand¹ and duties of the seller on the other.² For, “implied terms” and “duties” are not distinct concepts. To state that there is an implied term on the part of the seller to warrant that the goods shall be fit for their purpose (section 14(3)) and of satisfactory quality (sections 14(2A) and (2B)) is merely another way of imposing on him the duty of tendering goods which are fit for their purpose and satisfactory. Accordingly, the duty to deliver the goods is not a distinct and isolated obligation on the part of the seller but encompasses all his obligations, express and implied, as against the buyer with the respect to the goods including implied terms as to the title in them (section 12), their correspondence with the contractual description and sample (sections 13(1) and (2)), their satisfactory quality (section 14(2A) and (2B)) and their fitness for purpose (section 14(3)) for which they have been sold. One may even go further by remarking that, subject to any express stipulations by the parties in the contract, the status of these implied terms as conditions is relevant only to the buyer's right to reject; for if he elects to accept a defective tender, the broken implied condition sinks to the level of a warranty, thus restricting the buyer to a

¹ See Sale of Goods Act 1979, Sections 12-15.

² *Ibid.* Sections 27-33.

remedy in damages, whilst if the buyer rejects the tender on the ground of non-compliance of the tender with one of the conditions, the case becomes one of non-delivery which entitles him to treat the contract as repudiated if he can show that time of delivery was, or has become of the essence and has expired without a proper re-tender by the seller. In other words, it is a repudiatory failure by the seller and not a non-compliance of the goods with a statutory implied condition, which create a ground for the buyer to treat the contract as discharged. Accordingly, in contrast with Iranian law, the seller's failure to deliver can occur either because he tenders no goods at all, or because the goods tendered are properly rejected by the buyer on the ground of non-conformity with the contract.

As in the other legal systems under consideration, one of the seller's main obligation under English law is to deliver goods which conform with the contractual requirements concerning their quality and fitness. This obligation is imposed on the seller either by the terms agreed by the parties in the contract or by the terms implied by the law into the contract to give it minimum of business efficacy,³ doubtless in accordance with the paramount intentions of the parties to create a workable contractual agreement.⁴ Initially, the parties relationship was governed by the *maxim* of *caveat emptor*; that is the common law offered no protection to the purchaser as to the quality and fitness of the goods purchased where the contract contained no express provision in this respect.⁵ Therefore, the implied terms with regard to quality and fitness in sections 13-15 of 1893 Act was a significant step in the abandonment of the original common law *maxim* of *caveat emptor*. But weakness in the codification of these sections and growing concern with regard to sellers' freedom to contract out of the terms implied by law by a disclaimer clause led the legislators to pass the Supply of Goods (implied terms) Act 1973 which remodelled sections 13-15

³ See, *Lister v. Romford Ice & Cold Storage Co. Ltd.* [1957] AC 555; *The Moorcock* (1889) 14 PD 64.

⁴ See, *Hillas & Co. Ltd v. Arcos* [1932] All ER 494. In this case, Lord Tomlin states:

“[T]he problem for a court of construction must always be so to balance matters that, without violation of essential principle, the dealings of men may so far as possible be treated as effective, and that the law may not incur the reproach of being destroyer of bargains.” *Ibid.* at p. 499.

⁵ See, W. H. Hamilton, “The Ancient Maxim Caveat Emptor” (1928) 40 *Yale Law Journal* 1133.

of the original Act and restricted a seller's right to disclaim his obligations arising from the terms implied by the law. Further development concerning implied terms was made by the consolidated Sale of Goods Act 1979, which incorporated the amendments made by 1973 Act into the rest of the Sale of Goods Act with some minor alterations, but no change of substance. The Sale and Supply of Goods Act 1994 has made further modification in respect of the quality warranties.⁶ The three primary term laid down in the Act now appear in sections 13, 14(2) and 14(3).

The seller's liability for latent defects

Apart from the protection afforded under these sections, a buyer is left on his own to take a precautionary step to safeguard his interests by examining goods carefully before their purchase or by securing from the seller an express warranty, *caveat emptor*.⁷ Thus, unlike Iranian and French law,⁸ the buyer has no recourse against the seller for the damages resulting from latent defects in the goods in so far as they are in conformity with the contractual descriptions (section 14(3)) and where the seller is selling in the course of business if they are satisfactory within the context of section 14(2) of the Sale of Goods Act 1979 (as amended), even though the seller has wilfully hidden the defects from the buyer. In fact, while the seller under the civilian systems cannot exclude his liability as to a latent defect by a contractual exemption clause where he knew of the defects before the sale, following English law he has no liability for such a defect even if there is no exclusionary provision in the contract, provided that the defect does not render the goods unsatisfactory where the sale is taken place in the seller's course of business. This is because, as Professor Bridge pointed out, existence of a latent defect in the goods sold is not sufficient under the English system to render the seller liable for infringement of section 14(2).⁹

⁶ This Act has also amended the rules on acceptance and rejection of the goods by the buyer.

⁷ See Sale of Goods Act 1979, Section 14(1).

⁸ As to the position under French law, for example, see pp. 261-264, post.

⁹ M.G. Bridge, *the Sale of Goods* (1997), at p. 309. Nonetheless, the seller may be liable in tort if he is also the manufacturer of the goods sold provided that the defect is hidden and unknown to the customer or consumer. See, *Grant v. Australian knitting Mills, Ltd.* [1936] A.C. 85.

The seller's liability concerning price-worthiness of the goods

Similarly, the Act does not contain correspondent provisions with those of the Iranian legal system to require the seller to deliver goods in a quality which is commensurate with the contractual price.¹⁰ This means that the buyer will have no recourse against the seller under English law, even if at the time of the contract he did not know the market price of the goods and, therefore, the price set in the contract is substantially higher than the market price. This, together with the non-liability of the seller for latent defect, indicates that the protections afforded to the buyer under English law are far less than those of the civilian systems, particularly Iranian law. In fact, under the civilian systems, the relationship between the parties is based on the general principle of good faith which is to be observed by them both in making of the contract and its performance. This principle not only requires the seller to disclose any latent defect which he knows before entering into a contract, but also holds him liable against the buyer even if the defect was not known to him at the time of the contract. Under Iranian law, the principle of good faith, further, requires the seller to deliver goods which are also commensurate with the price. Unlike Anglo-US law, these provisions would obviate any anxiety in a potential buyer by assuring him that he would not be left unprotected in a bad bargain against the seller. Such a potential buyer, therefore, may not hesitate to enter into a contract with the seller even if his information about the thing which he purchases is not enough. Such an approach would, in other words, obviate any obstacle concerning free flow of goods in the market.

¹⁰ Before the assimilation of the law by the Sale of Goods Act 1893, the Scottish law, like the various civil law systems, required the seller to reveal any hidden defects to the buyer and to supply "price-worthy" goods to him. See, M.P. Brown, *Treatise on the Law of Sale* (1821), p. 285; J. J. Gow, "Warrantice in Sale of Goods: Nature and State of the Goods" (1963) *Juridical Review* 31; Elaine E. Sutherland, "Remedying an Evil? Warrantice of Quality At Common Law in Scotland" (1987) *Juridical Review* 24.

Express warranties

It is relatively common for the parties in a contract of sale to provide an express terms with regard to the description, quality and fitness of the goods sold.¹¹ As in the other legal systems under consideration, any deviation by the seller from such an express term, however trifling is, subject to the rule of *de minimis*, no doubt breach of the contract entitling the buyer to some remedy against the seller. The problem, however, under English law is that, in contrast with the Iranian system, unfortunately, not every statement by the seller with regard to the goods is taken to be an express warranty, but there are many instances in which such statements are considered as mere puffing, the breach of which gives rise to no liability against the seller. The case of *Walker v. Milner*,¹² for example, involved the sale of a safe which was stated by the seller as “strong, holdfast, thiefproof”. The court decided that there was no liability on such a statement, even though a burglar gave evidence that he broke into the safe within half an hour with ordinary implements, despite the fact that police looked through the window every 10 minutes.

As in the case of the UCC,¹³ the drafters of the UK Act, however, have failed to provide any standard to specify where statements concerning the goods are considered as an express warranty, the breach of which renders the seller liable against the buyer. Such a position not only creates an uncertainty to the buyer, but it may also encourage the seller to make false statements as to the goods hoping to sell them with a higher price and to escape from liability for breach of a warranty by asserting that the statements were mere puffing or reflection of his opinion about the goods.

The question may be posed as to why the seller should be allowed to make an statement concerning the quality of the goods which he knows to be false. The answer to this question lies in the fact that he will benefit from such a false statement by persuading the buyer to enter into a sale with conditions that are favourable to

¹¹ See generally, *Benjamin's Sale of Goods*, *op. cit. supra.*, Part 1, Ch. 1, note 17, pp. 461-487.

¹² (1866)4 F. & F.747. See also *Lambert v. Lewis* [1982] A.C. 225, 262(C.A.) where the court decided that no warranty of quality attaches to the word “foolproof” used in the contract.

him. If this view is correct, then the law should logically require the seller to accept his liability regarding the consequences of the statements, which are proved to be false.

Even where a statement by the seller is not regarded as his mere opinion about the goods, it does not necessarily constitute an express warranty under English law. This is the case where the seller undertakes to deliver goods in accordance with the contractual description or sample. In such instances, in contrast with the UCC, the seller's statements concerning the description are considered as implied terms under section 14(2) of the UK Sale of Goods Act 1979 even though descriptive words by the seller are indirect declaration of his will and thus are implied-in-fact promises and, as such, they must be taken as express warranties rather than implied-in-law promises. The reason for considering the seller's descriptive words in the contract as implied-in-law warranties rather than express promises by the drafters of the Act 1979 seems to lie in the historical background of the common law under which descriptions of the goods did not initially create any obligation against the seller with regard to the quality or fitness of the goods. The distinction between the two cases is not just an academic one but it has practical impact on the parties since, in the absence of an express provision as to the remedy for breach, an express term of the contract will often be treated as an innominate term, rather than a condition, the breach of which will only entitle the buyer to apply for damages, unless the nature and consequences of the breach are of such gravity as to justify to reject the goods and repudiate the whole contract, whereas descriptive terms are considered as conditions and, therefore, any deviation from them, however trifling, under the Sale of Goods Act 1979 (until it was modified by the 1994 Act), justified rejection of the goods.

Section 14 (2) of the UK Sale of Goods Act 1979 (as amended), draws a distinction between consumer and non-consumer contracts and states that the buyer, in a non-consumer sale, is not any longer entitled to reject the goods for trivial defects. Obviously, this modifications will bring the statutory implied terms closer to

¹³ See pp. 235-239, post.

innominate express terms where the buyer, only in the case of a substantial breach, may reject the sale. Nonetheless, unlike the UCC, this modifications fails to eliminate the distinction between conditions and warranties with innominate terms, or to equate the seller's descriptive words as express terms. Therefore, the difficulties over the need to distinguish the contractual provisions between express and implied terms will certainly continue to cause uncertainties among the parties concerned.

Implied terms concerning the quality of the goods sold

Correspondence with contractual description

According to section 13(1) of the Sale of Goods Act 1979,¹⁴ in a contract of sale there is an implied term that the goods shall correspond with their description. These provision prompt two fundamental questions. First, which words constitute description under the English law; and, secondly, when will a sale of goods be considered to have taken place by description?

Contractual description and mere representation by the seller

Concerning the first question, one should refer to the traditional common law distinction between mere representations on the one hand, and terms of the contract on the other hand, as the Act does not go any way to obliterate this distinction. For example, in *T & J Harrison v. Knowles and Foster*,¹⁵ the buyer purchased two ships from the seller. In the particulars supplied to the former, each of the ships was stated by the seller to have a dead-weight capacity of 460 tons, but no reference was made to this in the actual memorandum of sale. The buyer discovered that the capacity of each ship was only 360 tons. The Court of Appeal held that the seller's statement

¹⁴ For the provision of this section, see Appendix II.

about the capacity was a mere representation and, therefore, he did not infringe section 13(1) of the Act.¹⁶ Similarly, in the New Zealand case of *Taylor v. Combined Buyers Ltd.*,¹⁷ Salmond J held that traditional distinction between mere representations and terms of the contract is not affected by section 13(1). More recently, in *Harlingdon & Leinster Enterprises Ltd. v. Christopher Hull Fine Art Ltd.*¹⁸ it was decided that the sale of painting as a ‘Gabriel Münter’ (a German expressionist painter) was not sale by description. Referring to the facts that the plaintiff dealers were specialists in German expressionist painting, and the defendant dealer was not, and that the plaintiffs had inspected the painting, Nourse LJ observed:

“For all practical purpose, I would say that there cannot be a contract for the sale of goods by description where it is not within the reasonable contemplation of the parties that the buyer is not relying on the description.”¹⁹

In *Beale v. Taylor*,²⁰ on the other hand, the Court of Appeal appears to have come very close to disregarding the distinction between mere representations and contractual terms by giving a wide application to section 13 of the Act. In this case, the plaintiff entered into a contract for the purchase of a car which was advertised by the seller as a “Herald, convertible, white, 1961.” It was held that the words “1961 Herald” were part of the contractual description.

It seems, however, that the decisive fact in both types of the foregoing cases is the same; that is whether or not the buyer could reasonably be held to have relied on the seller’s statement with regard to the goods sold. Only if the answer to this question is affirmative then the statements may constitute part of the description of the goods within section 13 of the Act. In *Beale v. Taylor*, for example, the seller obtained a price well above the fair value and it was reasonable the buyer to assume that all the seller’s statements as to the goods were correct, whilst in *Harlingdon &*

¹⁵ [1918] 1 KB 608.

¹⁶ See also *Howard Marine & Dredging Co Ltd v. A Ogden & Sons (Excavations) Ltd.* [1978] QB 574 in which the court on similar facts awarded damages to the plaintiff under section 2(1) of the Misrepresentation Act 1969.

¹⁷ [1924] NZLR 627.

¹⁸ [1991] 1 QB 564.

¹⁹ *Ibid.*, at p. 574.

²⁰ [1967] 1 WLR 1193.

*Leinster Enterprises Ltd. v. Christopher Hull Fine Art Ltd.*²¹ the court found that the buyer did not *rely* on the description of the goods. In other words, like the UCC, the seller's liability with regard to the descriptive words in the contract, under English law, is limited to the cases where the buyer has relied on the descriptive words.

Descriptive words must concern with the Identity of the goods

Even if the seller's descriptive words become part of the contractual terms they do not automatically fall within ambit of section 13. Only those words which meet certain criteria may give rise to the seller's liability under this section, whilst others may give rise to liability by way of warranty or innominate, or intermediate term.²² This issue was discussed in the cases of *Ashington Piggeries v. Christopher Hill Ltd.*,²³ and *Reardon Smith Lines Ltd. v. Hansen Tangen*,²⁴ and the House of Lords, in both of these cases, seems to have accepted that the only descriptive words which are to be dealt with under section 13 of the Act are words which identify the object of the contract. Lord Diplock in the case of *Ashington Piggeries v. Christopher Hill Ltd*, for example, stated:²⁵

“ The ‘description’ by which unascertained goods are sold is, in my view, confined to those words in the contract which were intended by the parties to identify the kind of goods which were to be supplied. It is open to the parties to use a description as broad or as narrow as they choose. But ultimately the test is whether the buyer could fairly and reasonably refuse to accept the physical goods proffered to him on the ground that their failure to correspond with what was said about them makes them goods of a different kind from those he had agreed to buy. *The key to s. 13 is identification.*” [Italics added]

However, the concept of the words of identification is in itself troublesome. In the *Reardon Smith Lines* case, the appellant entered into a contract with the shipbuilders

²¹ [1991] 1 QB 564.

²² See, P. S. Atiyah, *The Sale of Goods, op. cit., supra.*, Part 1, Ch. 1, note 73, at p. 117 and the cases cited there. See also *Benjamin's Sale of Goods, op. cit. supra.*, Part1, Ch. 1, note 17, pp. 496-497.

²³ [1972] AC 441.

²⁴ [1976] 1 WLR 986; [1976] 3 All ER 570.

²⁵ [1972] AC 441, 503. There are, however, some cases in which the courts adopted a tendency to overlook the above distinction and treat all descriptive words as though they must create liability under section 13 of the Act; see, for example, *Arcos Ltd. v. E A Ronaasen & Son* [1933] AC 470, 470

to build a vessel to a certain specification at a particular yard (Yard No. 354 at Osaka Zosen) but the ship was in fact built in another yard. It was argued by the appellant that the words requiring the ship to be built at the particular yard specified were words of identification, for these words were the only means by which it was possible to identify the vessel being built at a particular yard with the specification provided in the contract. The House of Lords rejected this argument. Lord Wilberforce maintained that the idea of words of “identity” or “identification” have two different meanings.²⁶ Under his view, only those words which state or identify an essential part of the description of the goods are to be considered words of identity in this special sense, and, thus, are the subject matter of the implied condition in section 13.²⁷ Words that merely help to identify the place where the goods are stored, are not the words of identity in this special sense. Lord Wilberforce went on to express his dissatisfaction with the excessive technicality of some of the cases under section 13, such as *Re Moore and Co. Ltd. and Landauer & Co.*,²⁸ and suggested that it would be better if section 13 was confined to descriptive words which relate to a “substantial ingredient of the ‘identity’ of the thing sold”, leaving the other words to give rise to liability for breach of warranty or of an innominate or intermediate term.

It is important to point out that Lord Wilberforce’s view as to the concept of words of identification not only excludes the application of section 13 to words which do not constitute a substantial ingredient of the thing sold but it also resolved the existing doubt concerning possible applicability of this section in a sale of specific thing.²⁹ In other words, the seller’s liability under section 13 depends solely on whether or not the descriptive statements help the buyer to identify a substantial

per Lord Atkin ; *Re Moore & Co. Ltd. and Landauer & Co.* [1921] 2 KB 519, 524 per Lord Scrutton.

²⁶ [1976] 3 All ER 570, 576.

²⁷ *Ibid.*

²⁸ [1921] 2 KB 519.

²⁹ Accordingly, the description condition was infringed where a “breeding bull” turned out to be infertile. See *Elder Smith Goldsborough Mort Ltd v. McBride* [1976] 2 NSWLR 631. See further *Steele v. Maurer* (1976) 73 DLR (3d) 85, in which the seller was held to be liable for infringement of description condition where semen from particular Simmental bull was ordered, but that from a Brown Swiss bull delivered instead; *Tower Equipment Rental Ltd v. Joint Venture Equipment Sales Ltd* (1975) 9 OR (2d) 453 where the seller was found to be in breach of section 13(1) in delivering a tower crane, described as “like new” and just over 2 years old, but turned to be 10 years old as well as defective.

ingredient of the goods and, accordingly, it is immaterial whether the goods are specified or described.³⁰ This view is consistent with section 13(3) of the Act which makes it clear that exposing goods for sale or hire does not prevent a sale of goods from being a sale by description.

Extension of the law of description to cover specified goods may be taken as a significant step towards alignment of the law on description with the law on express warranty.

Reliance

Further limitation with regard to application of section 13(1) has been done by the introduction of reliance into description of the thing sold. Reliance is a feature of fitness for purpose under section 14(3) whereby the buyer must establish to have relied on the seller's skill and judgement for the seller to be liable; thus, its extension to cover the sales by description through the decision of the court in *Harlingdon and Leinster Enterprises Ltd v. Christopher Hull Fine Art Ltd*³¹ case is an innovation. The seller, in this case, sold a painting which was unequivocally stated to be the work of a German expressionist, Gabriele Münter. Unlike the buyer, who was expert in German expressionist art, the seller was not, and he relied upon an attribution in an earlier auction catalogue in his statement as to the painting. It was found, as a fact at trial, that the buyer did not rely upon the seller's statement but upon his own examination of the painting, which turned out to be forgery. By a majority, the Court of Appeal rejected the buyer's claim to hold the seller liable under section 13(1). Of

³⁰ See Stoljar, "Conditions, Warranty and Descriptions of quality in Sale of Goods -I", *op. cit., supra.*, note 69, at p. 445. In his article Stoljar concludes that:

"[t]he distinction between sale by description and sale by specific goods contains a completely false antithesis. For this distinction is based upon further distinction between identified and non-identified goods. But, ..., the logical antithesis, so far as it goes, is not between specific and described goods, but between goods identified, wholly or partly by description, and goods identified by acquaintance."

³¹ [1991] 1QB 564.

the majority judges, Nourse LJ thought the sale was not by description. Furthermore, for the seller to be in breach of section 13(1) his statement should have passed the test of a contractual condition, which it failed to do because of the buyer's lack of reliance.³² The other majority judge, Slade LJ, saw description as depending upon a common contractual intention that the disputed statement be a term of the contract. Reliance was not a necessary requirement of section 13(1) liability, but its absence, in the present case, was enough to disqualify the statement from constituting part of the description.³³

The introduction of the principle of reliance into description can be regarded as a further attempt to put the law on description in line with the law on express warranty.³⁴ If the court in *Harlingdon and Leinster* is successful in their attempt to integrate description into the law governing express warranties, there seems little point to retain sale by description under section 13(1) as a separate head of liability by a seller.³⁵ It seems, however, there is no reasonable justification for excluding the seller from liability for failing to supply goods in conformity with his statements, irrespective of whether the statements constitute an express warranty or a description under section 13(1) on the basis of the buyer's non-reliance on the statements. This is because the contractual price is based on the parties' understanding that the goods will comply with the statements. In other words, part of the contractual price received by the seller is based on the consideration of conformity of the goods with contractual statements. Therefore, in the case of non-conformity of the goods, the seller should be liable even if the buyer knew nothing about the statements until after the conclusion of the contract.

³² *Ibid.*, at p. 574.

³³ *Ibid.*, at pp. 584-585.

³⁴ For under the common law, an affirmation of fact or a promise by the seller with regard to the goods constitutes an express warranty only if the buyer has relied on it at the time of the contract. For the similar provision under section 12 of the US Uniform Sales Act, see Appendix I.

³⁵ The drafters of the Canadian Uniform Sale of Goods 1981 have removed description as a separate source of liability against the seller.

Examination of the goods

There is doubt whether the seller is exempted from liability where the buyer, at the time of the sale, examines the goods and thereby he either discovers or should have discovered that the description is inaccurate. Nonetheless, if the buyer's reliance on the description is essential for holding the seller liable under section 13(1) of the Sale of Goods Act 1979, then the seller's offer to the buyer to examine the goods may be taken to exclude the seller's liability against a non-conformity of the goods with the description, where the buyer should have reasonably discovered the non-conformity by the examination of the goods. Of course, the buyer's examination of the goods at the time of the formation of the contract which led to his actual detection of the non-conformity of the goods with the descriptions in the contract would exclude the seller's liability as to the non-conformity. However, in the absence of an express agreement by the parties, it appears that the law should not burden the buyer with a duty to examine the goods prior to the conclusion of the contract, and, in the case of the examination, the law should not deprive him of the right to sue the seller for breach of section 13 of the Act if the buyer did not actually detect the non-conformity of the goods with the description by the examination. This is because the buyer's aim in examining of the goods is not normally to confirm the accuracy of the description but to get to know the other attributes which are not included in the description.

Pursuant to section 6 of the Act 1977, any contractual clause to restrict the seller's liability under section 13(1) is invalid against a person dealing as consumer, while in a non-consumer sale, such an exclusionary clause by the seller is permissible only to the extent that is "fair and reasonable". Unfortunately, however, the limitation that an exclusionary clause is valid only where it is "fair and reasonable" does not apply to an international sale of goods contract.³⁶

³⁶ Under Articles 414 and 448 of the Iranian Civil Code in contrast, the seller may exclude his liability concerning description of specified goods only if they are generic and unascertained.

Satisfactory quality

The next implied term under the Sale of Goods Act 1979 (as amended) is that the goods supplied by the seller must be of satisfactory quality.³⁷ This is an alteration of the former condition under section 14 of the Sale of Goods Act 1979 requiring goods to be of “merchantable quality”. And although, unlike a sale by description under section 13(1), it does not apply to every contract of sale,³⁸ but, on the other hand, it provides the buyer with a greater degree of protection since, the goods which correspond with their description may not be of satisfactory quality.

In contrast with the civilian systems, under which the warranty against latent defect arises from the parties’ sale agreement, the requirement that the goods supplied must be of satisfactory quality, as well as the other implied terms with regard to quality and fitness of the goods, is imposed by the law and, therefore, it applies only where the goods are sold by the seller in the course of business.³⁹ This is, it seems, because only in such instances the buyer could have relied by implication on the knowledge and skill of the seller in purchasing of the goods, even though the law does not expressly require him to prove his reliance in all these instances. Thus, a private seller who is not selling in the course of business is not subject to liability as to quality of the goods under section 14(2), even if the defects in the goods virtually render the goods useless. It is established that mere seller’s involvement in a business activity is not enough for a sale to be done “in the course of business”, unless the buyer can show that the sale is integral to the business activity, rather than incidental to it.⁴⁰ This provision, along with the inapplicability of the civilian principles that the seller must act in “good faith” by revealing of any defect known to him to the buyer and that the goods supplied by him must be “price-worthy”, demonstrates that, unfortunately the *maxim* of *caveat emptor* still plays a

³⁷ See Section 14(2) of the Sale of Goods Act 1979 (as amended).

³⁸ In contrast with English law of sale, the original law requirement that the goods must be of “merchantable” quality has not been replaced by the UCC and this requirement applies where the goods are sold by a merchant.

³⁹ See *Benjamin’s Sale of Goods*, *op. cit. supra.*, Part 1, Ch. 1, note 17, § 11-045, at pp. 514-516.

⁴⁰ See, P. S. Atiyah, *The Sale of Goods*, *op. cit., supra.*, Part 1, Ch. 1, note 73, at p. 132.

major role in relationship between the parties under English law. As Lord Justice Clerk in the pre-unification Scottish case of *John Anson Whealler v. James Methuem*⁴¹ observed, when a buyer “sends an order for goods, without a word as to their quality, he is entitled to such an article, as the price entitled him to expect, of good, sound fair quality.”⁴² For, in the absence of an indication to the contrary, the price set between the parties is based on the understanding that the goods are free of any defect and price-worthy irrespective of whether the seller is selling in the course of business or not.

Where a private seller sells through an agent who is acting in the course of business, he is not exonerated from liability under section 14(2), unless the buyer is aware of this, or reasonable steps are taken to bring it to his notice before the conclusion of the sale.⁴³ In the Scottish case of *Boyter v. Thomson*,⁴⁴ the defender advised a firm to sell a cabin cruiser on his behalf under a brokerage and agency agreement to the pursuer who knew that the boat was being sold under a brokerage scheme, but thought that it was owned by the firm. The pursuer was not told that the name of the owner, nor that the owner was not selling in the course of business, nor that the firm was selling as the agent of the owner. The court of appeal held that the section 14(5) of the Sale of Goods Act 1979 allows the buyer to bring an action for breach of the sections 14(2) and (3) against the principal since the defender failed to bring to the buyer’s notice that he was not selling in the course of business.⁴⁵

The Seller’s defences against the requirement that the goods must be of Satisfactory quality

⁴¹ (1843) 5 D. 402.

⁴² *Ibid.*, at p. 406.

⁴³ Sale of Goods Act 1979, Section 14(5). Under section 15(2)(c) of the Act, there are no corresponding provisions to those of section 14(2) limiting the applicability of implied term concerning sales by sample to those instances where the seller sells “in the course of business”

⁴⁴ [1995] 2 AC 628 (H.L. (Sc.)), [1995] 3 All ER 135.

⁴⁵ *Ibid.*, at p. 632 per Lord Jauncey of Tullichettle.

Like the law of warranty against latent defects under civilian systems, the seller is discharged from the liability under section 14(2) concerning the defects which he draws to the buyer's attention, and in the case of examination of the goods by the buyer with respect to those defects which that examination ought to have revealed before the conclusion of the contract.⁴⁶ Moreover, pursuant to section 14(2C)(c) of the 1979 Act, in the case of sale by sample, the implied condition that the goods are satisfactory is excluded if the defects would have been detected on a reasonable examination of the sample, even if, unlike previous case, the buyer has actually failed to make such examination.⁴⁷ In fact, as in a sale by sample the buyer is supposed to have reasonably examined the sample before the conclusion of the sale, his complaint with respect to the defect which could have reasonably discovered by that examination will be rejected.⁴⁸ The implied condition will well be excluded where the buyer in fact examines the sample and discovers the defect which renders the goods unsatisfactory and he, "notwithstanding and with knowledge of that defect in the sample, is content to take a delivery which corresponds with the sample and gets such a delivery."⁴⁹ On the other hand, if the defects in the goods are not discoverable by any reasonable examination, the seller will be responsible for breach of the implied condition to supply goods of satisfactory quality irrespective of whether or not the buyer in fact carried out such an examination on the goods.⁵⁰

⁴⁶ For the full provisions of section 14 (2C) of the Sale and Supply of Goods Act 1979 (as amended), see Appendix II. As an example, the court in *Grant v. Australian Knitting Mills Limited*, *supra.*, note 9 held that the seller was liable for the breach of section 14 of the South Australia Sale of Goods Act 1895 (identical with section 14 of the English Sale of Goods Act 1893) since the presence of the deterious chemical in the goods purchased by the buyer was hidden and latent defect which could not be detected by any examination that could reasonably be made.

⁴⁷ *Ibid.* Unlike the UCC, under which in the case of sale by sample, the seller's obligation to supply goods in conformity with the sample is regarded as an express warranty, English law considers this obligation as implied warranty imposed by the law.

⁴⁸ Before amendment of law by the Sale of Goods Act 1979 it was argued that where the implied condition of merchantable quality was excluded under section 15(2)(c) concerning the defects which examination of the sample would have revealed, the buyer might still sue the seller under section 14(2) as to defects which could not be detected by actual examination. However, the amendment of the Sale of Goods Act 1979 clearly in both section 14(2) and section 15 states that in the event of a sale by sample, it is what a reasonable examination of the sample ought to have been revealed and not any actual examination.

⁴⁹ *Houndsditch Warehouse Co. Ltd. v. Waltex Ltd.* [1944] 2 All ER 518, 519.

⁵⁰ See, for example, *Grant v. Australian Knitting Mills Ltd*, *supra.*, note 9.

A particular problem arose in *R & B Customs Brokers Co. Ltd v. United Dominions Trust*,⁵¹ where the plaintiff company bought a car on conditional sale for the private use of its director. The defendant delivered the car a few days before the contract being legally concluded between the parties, as they had not yet signed of the relevant documents. Before signing of the said documents, the plaintiff discovered that the roof was leaking and the defendants undertook to repair it some days latter. After numerous attempts the defendants did not succeed to repair the car satisfactorily and, consequently, the plaintiff rejected the car on the basis of the breach of implied condition as to quality and fitness. The defendant argued that the examination and discovery of the defect by the plaintiff before conclusion of the contract excluded his liability (the defendant liability) under section 14(2)(b) of the 1979 Act with respect to that defect. The Court of Appeal felt that if that was the result of the statutory wording, it would be a trap for a buyer who took delivery before making a concluded contract. Nonetheless, no decision was taken on this ground, instead the seller was held liable for breach of section 14(3) concerning the implied condition as to fitness of the goods for a particular purpose for which they were purchased. section 35(6) of the 1979 Act (as amended) provides that the goods are not deemed to have been accepted by the buyer who merely ask for or agrees to their repairs, but as can be seen this provision does not go far enough to address the foregoing problem.

Obviously, no problem would arise if before the conclusion of the sale, the seller undertakes to repair the defects in the goods, for in such instances he would be liable for breach of a separate collateral contract or of an express term of the contract where he fails to comply with his undertaking. But in *R & B Customs Brokers* the seller undertook to repair the leak after the contract was made, and thus there was no separate collateral contract or warranty on the ground of his undertaking under English law.

The above problem, however, has been properly resolved under the UCC by considering the seller's post-contractual statements with regard to the goods as a

⁵¹ [1988] 1 All ER 847.

modification of the contractual warranty which, unlike English law, need not be supported by consideration.⁵² This approach is consistent with Iranian and French law, both of which allow the parties to adjust the provisions of the contract in favour of either of the parties after its conclusion without any need for consideration.

The scope of the application of the term “satisfactory”

The application of the implied condition as to the merchantability of the goods under section 14(2) of the 1979 Act was extended to cover not only the goods actually bought by the buyer and passing to him, but packages or containers in which the goods are sold, even if they remain the property of the seller.⁵³ It equally applied to new and used goods,⁵⁴ and to natural commodities, such as grain,⁵⁵ and to complex manufactured goods and to goods purchased for resale as well as to goods purchased for private consumption.⁵⁶ These provisions, which are also consistent with those of civilian systems with respect of the warranty against latent defects in the goods sold, have not been altered by the 1994 Act.

The extent of the seller’s liability under section 14(2)

The reasonableness requirement

⁵² See UCC, Section 2-313, Comment 7.

⁵³ See, e.g., *Gedding v. Marsh* [1920] 1 KB 668; *Beecham Foods Ltd v. North Supplies (Edmonton) Ltd* [1959] 2 All ER 336, 1 WLR 643; *Wilson v. Rikett Cockerell & Co Ltd* [1954] 1 QB 598.

⁵⁴ As to the application of the implied condition of merchantable quality to used goods see *Lutton v. Saville Tractors (Belfast) Ltd* [1986] 12 NIJB 1, where Carswell J held that in the case of sale of a second-hand car, it should be “reliable and capable of giving good service and fair performance”. See further, *Business Appliances Specialists Ltd v. Nationwide Credit Corp’n Ltd* [1988] RTR 32, in which the court of Appeal argued that the test for application of merchantability to a second-hand vehicle is precisely the same as the one to be applied to a new one; that is whether the vehicle was as fit for their purpose as it was reasonable to expect.

⁵⁵ *Wallis v. Russell* [1902] 2 IR. 585.

⁵⁶ *Bristol Tramways Co. Ltd v. Fiat Motors Ltd* [1910] 2 KB 831, 840

The extent of the seller's obligation under section 14(2) depends largely upon the meaning to be attached to the term 'satisfactory quality'. However, this term like its predecessor 'merchantable quality' is vague. In fact, as Professor Atiyah points out, statements such as 'mercantile quality'⁵⁷ and 'satisfactory quality'⁵⁸ "heavily rely on the test of reasonableness" which despite having substantial flexibility for applying to very varied transactions which come within the law of the sale of goods, is "somewhat circular in practice"⁵⁹ and consequently, they offer little guidance as what kind of defects or damages may render the goods unsatisfactory. Professor Atiyah rightly rejects the court's argument in *Rogers v. Parish (Scarborough) Ltd*⁶⁰ which assumed that the application of the statutory definition of merchantable quality under old section 14(6) was a question of fact and points out that the existence of the element of reasonableness in both the definition of "merchantable quality" and "satisfactory quality" demonstrates that questions of *evaluation* are necessarily involved in both instances.⁶¹ This entails that the detailed analysis and illustration in the earlier cases are to be available for the evaluation of each case by the parties concerned, otherwise every case is to be disposed of by appealing to the court something which is quite unacceptable in such a large and important area of law as this.⁶²

⁵⁷ For the definition of the term 'merchantable quality', under section 14(6) of the Sale of Goods Act 1979, see Appendix II.

⁵⁸ For the definition of the term "satisfactory" under sections 14(2A) and 14(2B) of the Sale and Supply of Goods Act 1979 (as amended), see Appendix II.

⁵⁹ See, P. S. Atiyah, *The Sale of Goods, op. cit., supra.*, Part 1, Ch. 1, note 73, at p.140. Professor Atiyah states:

"what is the buyer entitled to expect under the contract? Answer - goods of satisfactory/merchantable quality. What is satisfactory/merchantable quality? Answer - goods of that quality (roughly speaking) which is reasonable to expect. What would the buyer reasonably expect? Answer - goods suitable for reasonable use. What is reasonable use? Answer - the sort of use which a reasonable buyer would intend. And so on." *Ibid.*

⁶⁰ [1987] QB 933.

⁶¹ See, P. S. Atiyah, *The Sale of Goods, op. cit., supra.*, Part 1, Ch. 1, note 73, at pp. 140 - 41.

⁶² *Ibid.* At p. 141.

The issue of fitness for purpose

Prior to the first enactment of a definition of merchantable quality in 1973, it was established by some cases that multi-purpose goods were of merchantable quality if fit for at least one purpose in the range of ordinary purposes;⁶³ and, thus, the buyer seeking added protection had to communicate his particular purpose to the seller to invoke separate implied term of reasonable fitness. Where the goods did not satisfy the buyer's non-communicative purpose, it was always a difficult matter to determine whether there were other existing purpose in the range of ordinary purposes. An expensive vehicle could not be said to be of merchantable quality just because it was saleable as scrap, since the price and the description of the vehicle exclude scrap from its range of ordinary purpose. In *Jones v. Padgett*⁶⁴ a dealer sold a quantity of indigo cloth to another dealer who also carried on a business as a tailor. The buyer intended to have the cloth made up for servants' liveries, but he did not inform this to the seller. Because of a latent defect, the cloth proved to be unsuitable for making liveries but, it could be used for other ordinary purposes. The court rejected the buyer's claim that the defect rendered the cloth unmerchantable.

The enactment of the statutory definition of merchantable quality in 1973 raised the question whether the seller could still enjoy the previous immunity if the goods were fit for one of their ordinary purpose. In *Aswan Engineering Establishment Co v. Lupdine Ltd*,⁶⁵ the sellers of waterproofing compound in plastic pails for export to Kuwait were found liable against the buyers for the loss of waterproofing compound caused by the collapse of plastic containers which occurred when they were staked in intense heat and pressure when exposed for a lengthy period to the Kuwait sun. The seller, in turn, sought to recover damages for breach of section 14(2)⁶⁶ from the

⁶³ See, e.g., *James Drummond and Sons v. E. H. Van Ingen & Co* (1887) 12 App. Cas. 284; *Kendall (Kendall) & Sons v. William Lillico & Sons Ltd* [1969] 2 AC 31.

⁶⁴ (1890) 24 QBD 650. The court in *Kendall (Kendall) & Sons v. William Lillico & Sons Ltd* [1969] 2 AC 31 confirmed the reasoning of the above decision and extended its application to cover dangerous goods.

⁶⁵ [1987] 1 WLR 1; [1987] 1 All ER 135.

⁶⁶ Their claim was also based on breach of section 14(3) as well as in tort which do not concern the present discussion.

manufacturing sellers of the containers who conceded that the containers has been described in the contract as heavy duty pails for export shipment.⁶⁷ The Court of Appeal rejected the plaintiff's argument that the law was changed by 1973 enactment because now the goods had to be "as fit for the purpose or purposes", meaning all purposes "for which goods of that kind are commonly bought as it is reasonable to expect" and held that the goods satisfied the requirement that they should be of merchantable quality. Lloyd LJ concluded that, if the legislators had wished to change the law in the radical way argued for by the claimant they would have mentioned it in the relevant section of the Act.⁶⁸ In a concurring judgement, Nicholls LJ observed that it would be unreasonable to impose liability when the containers were perfectly adequate for the job in all but the most unusual conditions. Perhaps the best reason for taking this decision was that the export to Kuwait was a special purpose, which the claimant failed to disclose to the seller.⁶⁹

How to define a purpose or purposes of goods supplied by a seller is an issue which was not settled in the *Aswan* case. The court treated export to Europe and to Kuwait as separate purposes, but it may be argued that there is but one purpose, packaging sealant for export. If this were so, then the focus would shift to whether the container was reasonably fit for that purpose or not. If Europe and Kuwait are separate purposes, then why should not further differentiation occur so that different countries with different peculiar climates in different seasons in Europe be distinguished. The new definition of satisfactory quality addresses this thorny problem by including

"in appropriate cases... fitness for *all purposes* for which the goods of the kind in question are commonly supplied".⁷⁰

What is the "appropriate cases" where the goods are to be of satisfactory

⁶⁷ *Supra.*, note 65, p. 25.

⁶⁸ This conclusion was supported by Fox LJ.

⁶⁹ *Supra.*, note 65, p. 15. See also *Kendall (Kendall) & Sons v. William Lillico & Sons Ltd*, *supra.*, note 64 in which the court argued that since the goods were usable for one of the main purposes for which such goods are commonly bought; it would be unreasonable to say that because the goods were unsuitable for only one of these possible uses the goods were to be treated un-merchantable.

quality

Accordingly, under the section 14(2B)(a) the Act 1979, the buyer is entitled to expect that the goods would be fit for all ordinary purposes as defined by the description and the price paid.⁷¹ However, whilst the new definition of satisfactory quality under this section states that the seller only in “appropriate cases” would be liable for all ordinary purposes, the Act does not clarify what cases are considered appropriate for rendering the seller liable against the buyer. This may cause a considerable uncertainty among the parties concerned. It may be argued that the result in the *Aswan* case should stand, given the extremity of the conditions in which the container collapsed.

Safety of the goods

Under the new law, safety of the goods is one of the factors to be taken into account in deciding whether they are of “satisfactory quality” under section 14(2B)(d). It is established law that the goods which cannot be safely used are not of satisfactory quality.⁷²

Latent defects

A major point which is to be considered is the issue of the latent defect in the goods and its impact over the problem of satisfactoriness of the quality. Whilst under the civilian systems, any defect hidden in the goods entitles the buyer to cancel the sale

⁷⁰ Sale of Goods Act 1979, Section 14(2B)(a) (as amended). (Italic added).

⁷¹ See Law com. No. 160, para. 3.36.

⁷² See Section 14(2B)(d) of the Act 1979 (as amended). Although the previous definition of section 14(2) of this Act contained no provisions to this effect, there were some cases which mostly related to sale of cars and in which the sellers were held that to be liable for breach of condition to supply goods of merchantable quality where they could not be safely used. See, e.g., *Bernstein v. Pamson Motors (Golders Green) Ltd.* [1987] 2 All ER 220; *Lee v. York Coach & Marine* [1977] RTR 35.

and to recover the price paid to the seller, English law allows him to do so only if such a defect renders the goods unsatisfactory under section 14(2). This means that, unlike the former systems, the presence of a defect in the goods in itself is not sufficient for the buyer to reject the goods under English law.⁷³ On the other hand, the mere fact that the goods appear all right and saleable in the market is not equally sufficient to render them of satisfactory quality within the context of section 14(2). To find out whether the goods were merchantable under the previous provisions there was an assumption that all latent defects were fully known and the new provisions have made no change in this respect.⁷⁴ There are many instances in which goods, such as drugs and medicines, may be dangerous and thus unsatisfactory if they are sold without providing adequate information, whilst equally they would be perfectly satisfactory if such information is given to the buyer at the time of the sale.⁷⁵ But, unfortunately, not all cases have followed this common sense in dealing with the issue of merchantability. For example, in *Kendall (Henry) & Sons v. William Lillico & Sons Ltd*,⁷⁶ the ground nut extraction sold to the buyer was held to be merchantable for it was fit for its most common use, namely for compounding into animal feeding stuffs. Any feeding stuff containing the extraction was suitable for feeding cattle and other animals rather than pheasant and partridge chicks. In fact, it transpired that the animal feeding stuff made from ground nut extraction was not only unsuitable to feed pheasants and partridge chicks, but also dangerous and poisonous to them. Surely, the buyers could avoid any damages sustained as a result reselling of feeding stuff produced with the toxic ground nut extraction to his sub-buyers had the seller at the time of the contract informed them of this fact, since, the buyer could simply have labelled the feeding stuff containing the ground nut extraction by a phrase such as “not suitable for pheasant and partridge chicks”. Notwithstanding the damage sustained by the buyers as a consequence of the seller’s failure to inform them of the poisonous nature of the extraction, the House of Lords held that these facts did not

⁷³ See M. G. Bridge, *The Sale of Goods*, *op. cit.*, *supra.*, note 9, p. 309.

⁷⁴ See *Grant v. Australian Knitting Mills Ltd*, *supra.*, note 9, at p. 100 per Lord Wright.

⁷⁵ *Willis v. FMC Machinery & Chemical Ltd* (1976) 68 DLR (3rd) 127; *Vacwell Engineering Co Ltd v. BDH Chemicals* [1969] 3 All ER 1681.

⁷⁶ [1969] 2 AC 31.

render the goods of unmerchantable quality. The House based its decision on the “acceptability” test by finding that the buyer with full knowledge of all the facts would have accepted the goods in discharge of the contract without substantial abatement of the price. It seems, however, hard to justify this reasoning. It might be thought that the acceptability test adopted by the court, in this case, resembles the Iranian law tradition under which the goods delivered must be price-worthy. However, this conception is not correct. This is because, the acceptability test can only be used against the buyer to deprive him from recovering damages for the defects in the goods while the priceworthy requirement entitles him to reject where the contractual price of the goods is substantially higher than their market price at the time of the conclusion of the contract.

The factor of the price

The decision in *Kendall* case demonstrates that the issue of the satisfactory quality under section 14(2) will require account to be taken of the price.⁷⁷ One may reach to the same conclusion by considering the case of *B. S. Brown & Son Ltd v. Craiks Ltd*.⁷⁸ In this case, a quantity of ‘fibro Plain Cloth’ was sold according to detailed technical specifications⁷⁹ which did not disclose the precise purpose of the buyers. The contractual price was 36.25d. per yard and the buyers’ aim, unknown to the sellers, was to use the cloth for making dresses. The buyers discovered that the cloth was not suitable for making of dresses, and thus sought damages on the ground that the cloth was unmerchantable. It was argued for the buyers that the price paid took the cloth out of the range of industrial wear and limited its ordinary purpose to dress manufacturing. As a fact the price was found to be low for the dress fabrics but at the top end for industrial fabrics, without being unreasonably high. It was held that this fact did not render the goods unmerchantable for the price paid was still within the range of industrial fabrics. The *Brown* case is significant in that House of Lords did

⁷⁷ See Sale of Goods Act 1979, Section 14 (2A) (as amended).

⁷⁸ [1970] 1 All ER 823.

⁷⁹ *Ibid.*, at p. 829:

accept that the price, even in the absence of helpful descriptive language, might define the range of ordinary purposes for the application of the merchantable quality standard.

What grade of quality satisfies the requirement of satisfactory quality

There are many instances in which infinitely variable qualities may be available for the kind of goods sold. Unlike the UCC, which requires the seller to deliver a “fair average quality” within the contract description,⁸⁰ the term “satisfactory”, like its predecessor “merchantable”, under English law, does not connote that the goods are to be of any particular grade of quality. As Salmond J pointed out in the New Zealand case of *Taylor v. Combined Buyers Ltd.*⁸¹

“ The term ‘merchantable’ does not mean of good, or fair, or average quality. Goods may be of inferior or even bad quality but yet fulfil the legal requirement of merchantable quality. For goods may be in the market in any grade, good, bad or indifferent, and yet equally merchantable. On a sale of goods there is no implied condition that they are of any particular grade or standard. If the buyer wishes to guard himself in this respect he must expressly bargain for the particular grade or standard that he requires. If he does not do so, *caveat emptor*; and he must accept the goods, however inferior in quality, so long as they conform to the description under which they sold and are of merchantable quality-the term ‘quality’ including state or condition.”

Similarly, in *Kendall v. Lillico*,⁸² Lord Reid pointed out that where goods are sold in the market under some general description, of which there may be several different qualities available, the seller may satisfy his duty by providing the goods which comply with the lowest quality under which goods of that description can commonly be sold.⁸³ Nonetheless, where different grade of quality of goods of general description are fit for different common use of the goods of that description, it seems that fulfilment of the requirement of satisfactory quality may following to the *dicta* of the *Brown* case depend almost entirely on the contractual price. For as pointed out

⁸⁰ See UCC, Section 2-314(2). See further, p. 249-250, post.

⁸¹ [1924] NZLR 627, 645.

⁸² [1969] 2 AC 31, 79-80.

⁸³ See further the Australian case of *Goerge Wills & Co Ltd v. Davids Pty Ltd* (1956-57) 98 CLR 77.

earlier, a higher price paid by the buyer indicates that he is entitled to receive something more than the lowest quality available in the market. In other words, in contrast with the Iranian system under which apart from the warranty against latent defects, the quality of the goods supplied by the seller must be commensurate with the price, the seller following English law only in the instances mentioned above may be liable for breach of the implied condition under section 14(2) if the quality of the goods supplied is not commensurate with the price.⁸⁴

Durability of the goods

Durability is another factor of satisfactory quality, which has attracted specific mention in section 14(2B)(e) of the Act 1994. It requires the goods delivered to have capacity to remain in satisfactory condition for a reasonable period of time. The issue of durability was raised in *Mash and Murrell v. Joseph I Emmanuel*,⁸⁵ where the sellers in Cyprus entered into an agreement for the sale of a quantity of potatoes C. & F. Liverpool. Although the potatoes were sound at the time of loading, they were rotten by the time of the arrival of the ship. The seller was rightly held to be in breach of the condition of merchantability implied by section 14(2). Diplock J pointed out that in such a sale the goods must be loaded in “such a state that they could endure the normal journey and be in a merchantable condition on arrival.”⁸⁶

As to what is a reasonable time during which, if the goods cease from being of satisfactory quality, the seller will be liable for infringement of section 14(2B)(e), is a question of fact which depends on the nature of the goods and the surrounding circumstances of the case, including the price received by the seller. Thus, a buyer who pays higher price for a high-quality article can reasonably expect it to last longer than the cheaper one purchased at a low price. Nonetheless, the fact that the goods was price-worthy at the time of the sale should not be taken as an excuse by a trial court to deprive the buyer from his right to acquire durable goods under section 14 of the Sale of Goods Act 1979 (as amended). This was unfortunately the case in

⁸⁴ See *Goldup v. John Manson Ltd* [1981] 3 All ER 257.

⁸⁵ [1961] 1 All ER 485. See also *The Rio Sun* [1985] 1 Lloyd's Rep 350.

Thain v. Anniesland Trade Centre,⁸⁷ where the purchaser of a five year old car which had travelled about 80,000 miles, raised an action against the seller, asserting that the car was not of satisfactory quality in terms of section 14 of the Sale of Goods Act as only after two weeks after using the car he detected a defect with the result that the car could no longer be used. The court held against the purchaser arguing that the price paid for the second hand car of its age and mileage was reasonable and that in buying the car of this age and mileage the buyer immediately assumed the risk of repair and therefore, durability “was simply not a quality that a reasonable person would demand of it”.⁸⁸

On the face of it, this may suggest that the factor of durability, like the Iranian system,⁸⁹ requires the quality of the goods to be commensurate in every case with their contractual price. This construction, nonetheless, is not correct, as there are many cases in which the goods supplied may be durable but not price-worthy. However, there is doubt whether the contrary might be the case; i.e., it is unclear whether a price-worthy article might be considered not durable within the meaning of section 14(2B) as to render it of unsatisfactory quality.⁹⁰

The buyer's right when only part of the goods are of satisfactory quality

Like Iranian law, where only part of the goods delivered are unsatisfactory, English law allows the buyer to reject the whole goods where he wishes to do so. Nevertheless, this remedy is not available to him under English law if the breach is so trivial as to permit the seller to invoke the *de minimis* rule.⁹¹

⁸⁶ [1961] 1 All ER 485, at p. 488.

⁸⁷ 1997 SLT (Sh Ct) 102.

⁸⁸ *Ibid.*, p. 106

⁸⁹ See pp. 281-285, post.

⁹⁰ See *Goldup v. John Manson Ltd*, *supra.*, note 86 where it was held that if the price is commensurate with the quality in fact supplied, the goods will be Satisfactory (formerly merchantable).

⁹¹ See *Jackson v. Rotax Motor & Cycle Co Ltd* [1910] 2 KB 937.

Fitness of the goods for the buyer's particular purpose

The seller who sells in the course of business is not only responsible to supply goods which are of satisfactory quality as discussed before, but under section 14(3), he is also bound to make sure that the goods are fit for any "particular purpose" for which they are being purchased and which was made known to him either expressly or by implication by the buyer at the time of the sale.⁹²

The implied condition that the goods must be fit for the buyer's particular purpose is a significant protection, which has been provided alike by both US and English law, but has no correspondence under the civilian systems. As other implied terms, this protection particularly depends on the principle of reliance by the buyer on the seller's skill and judgement. Accordingly, the buyer cannot avail himself of this protection if there is any evidence to indicate that "he does not rely, or that it is unreasonable for him to rely, on the skill or judgement of the seller" with respect to the suitability of the goods for the particular purpose for which they are required.⁹³ The language of the section 14(3) connotes that the law presumed the buyer's reliance if he can show that he has made known to the seller the purpose for which the goods are being bought, unless the latter positively disproves the reliance, or unless he can show that the buyer could not have reasonably relied on his skill or judgement. Nonetheless, unlike the UCC,⁹⁴ under the UK Act, it is not enough for the presumption of the reliance that the seller himself has reason to know the particular purpose for which the buyer acquiring the goods. However, as Professor Goode notes the question of reliance has been interpreted by the English courts very literally, and, "if the particular is known to the seller or is apparent from the circumstances of the contract, this will suffice as an implied communication of the purpose by the buyer".⁹⁵

⁹² Sale of Goods Act 1979, Section 14(3).

⁹³ See Sale of Goods Act 1979, Section 14(3).

⁹⁴ See UCC, Section 2-315.

⁹⁵ Goode, *Commercial Law* (2nd ed. 1995), at p. 334; see further, *Slater v. Finning Ltd.* AC 473, 486-487 (H.L.(Sc.)) per Lord Steyn.

When the buyer could be said to have relied on the seller's skill or judgement is a question of fact, but the use of the term "unreasonable", in this respect, demonstrates that an element of evaluation must also be involved. The fact that both the seller and the buyer run their own respective businesses in the same commodity market does not necessarily mean that the buyer cannot rely on the seller, although it no doubt tends against the inference of such reliance.⁹⁶ Accordingly, a merchant-buyer may be found to have relied on the seller where, for example, he makes known to the seller his particular purpose in purchasing the goods and the seller recommends them to him. Similarly, the seller who is also the manufacturer of the goods sold could hardly dispute the buyer's reliance.⁹⁷ On the other hand, it is unreasonable to hold the buyer to have relied on the seller where the latter in effect has disclaimed his responsibility and has merely proffered his advice for what it is worth.⁹⁸ Moreover, where the goods are sold for export to other countries, the mere fact that the seller knows that the goods are being purchased for import to a foreign country is not sufficient under English law to show that the buyer relies on the skill or judgement of the seller concerning suitability of the goods in that particular country. For in such a case it is the buyer but not the seller who suppose to know the necessary knowledge of the conditions in the country of import, and therefore, his reliance on the seller may be held to be unreasonable. In *Tehran-Europe Corpn Ltd v. S. T. Belton (Tractors) Ltd*⁹⁹ for example, the buyers, an Iranian company, bought air compressors from English sellers through an English intermediary. The seller knew that the goods were destined for resale in Iran.¹⁰⁰ When it transpired that, under Iranian law, the goods could not be resold as "new and unused", the court rejected the buyer's claim that the sellers were liable, on the basis that the buyers knew all and the sellers nothing about the Iranian market.

⁹⁶ *Kendall (Kendall) & Sons v. William Lillico & Sons Ltd*, *supra.*, note 63, p. 124.

⁹⁷ *Ibid.*, p. 95.

⁹⁸ See Law Commission Report, *Exemption Clauses: First Report*, para. 37.

⁹⁹ [1968] 2 QB 545.

¹⁰⁰ *Ibid.* 554 (Denning MR).

The fact that the buyer has only partially relied on the seller's skill or judgement does not preclude him from asserting a breach of section 14(3),¹⁰¹ provided that the reliance in question is "such as to constitute a substantial and effective inducement which leads the buyer to agree to purchase the commodity"¹⁰² and that unfitness of the commodity is attributable to some fact within the seller's sphere of expertise on which the buyer relied.¹⁰³ Section 14(3) does not contain any provision equivalent to section 14(2C)(b), which excludes the seller's liability for unsatisfactory goods as regards matters that an examination conducted by the buyer ought to have revealed. Nevertheless, there is a danger that such an examination may be considered as an evidence to negate the buyer's reliance on the seller's skill or judgement for the purpose of section 14(3).

The word "reasonably," under section 14(3), indicates that fitness for purpose is a relative concept. Whether goods are reasonably fit for their purpose known to the seller is to be determined objectively, and does not in any way depend on the degree of diligence or care which the seller has exercised. Accordingly, the fact that the goods are unfit through some latent defects which are undiscoverable by any amount of diligence and care does not discharge the seller from being liable for breach of section 14(3), since it does not in any way make the goods more suitable for their purpose than if no care had been exercised by the seller.¹⁰⁴ Similarly, the fact that the idea of an implied condition is based on the seller's skill and judgement does not entails that he complies with its requirement by the exercise of all reasonable care and skill. As Lord Reid pointed out in *Henry Kendall & Sons v. William Lillico & sons Ltd.*¹⁰⁵

" If the law were always logical one would suppose that a buyer, who has obtained a right to rely on the seller's skill and judgement, would only obtain thereby an assurance that the proper skill and judgement had been exercised and

¹⁰¹ See, e.g., *Cammell Laird & Co Ltd v. Manganese Bronze & Brass Co Ltd* [1934] AC 402, at p. 414, per Lord Warrington.

¹⁰² *Medway Oil & Storage Co Ltd v. Silica Gel. Corp'n* (1928) 33 Com Cas 195, 196 per Lord Summer.

¹⁰³ *Ashington Piggeries Ltd v. Christopher Hill Ltd* [1972] AC 441.

¹⁰⁴ *Randall v. Newson* (1877) 2 QBD 102; *Kendall (Kendall) & Sons v. William Lillico & Sons Ltd*, *supra.*, note 63.

¹⁰⁵ *Ibid.* at p. 84.

would only had been exercised and would only be entitled to a remedy if a defect in the goods was due to failure to exercise such skill and judgement. But the law has always gone farther than that. By getting the seller to undertake to use his skill and judgement the buyer gets under section 14(1) an assurance that the goods will be reasonably fit for his purpose and that covers not only defects which the seller ought to have detected but also defects which are latent in the sense that even the utmost skill and judgement on the part of the seller would not have detected them.”

Implied terms that the goods must correspond with sample

As in the French, Iranian and the systems, under English law the seller in the case of sale by sample is obliged to deliver goods in conformity with the sample in quality. But whilst under all the former systems this obligation constitutes part of the seller’s express warranties which arises from the contract, English law considers it as an obligation which has been impliedly imposed by the law.

As in Iranian and French law, there is no statutory definition of a sale by sample under English law. The governing provision on sale by sample is section 15, which was the subject of a number of consequential amendments under the Sale and Supply of Goods Act 1994.¹⁰⁶ According to section 15(1):

“A contract of a sale is a contract for sale by sample where there is an express or implied terms to that effect in the contract.”

This provision indicates that the mere fact that a sample is provided for inspection by the buyer during negotiation for a sale is not sufficient to make the sale a sale by sample. It is necessary that the sample displayed be intended to form the contractual

¹⁰⁶ For example, the buyer’s right to compare the bulk with the sample has now been written into section 34 which deals with examination of the goods sold. The first two subsections of section as amended by the 1994 Act provides:

- “(1) A contract of sale is a contract for sale by sample where there is an express or implied term to that effect in the contract.
- (2) In the case of contract for sale by sample there is an implied term
 - (a) that the bulk will correspond with the sample in quality;
 - (b) that the buyer will have reasonable opportunity of comparing the bulk with the sample [this subsection has been repealed by the Sale and Supply of Goods act 1994 but the equivalent provision is now to be found in section 35(2)(a)];
 - (c) that the goods will be free from any defect, making their quality unsatisfactory.”

basis of a comparison with the bulk of the goods subsequently tendered. A sale by sample, in other words, takes place only where there is an express or implied term of the contract to that effect.¹⁰⁷ Accordingly, in *Gardiner v. Gray*,¹⁰⁸ the plaintiff's claim that the sale took place by sample was rejected on the ground that:

"sample was not produced as a warranty that the bulk correspond with it but to enable the purchaser to form a reasonable judgement of the commodity".¹⁰⁹

What is the function of a sample under the English law is a question which has been considered by Lord Macnaghten in *James Drummond and Sons v. E. H. Van Ingen & Co Ltd*:

"The office of a sample is to present to the eye the real meaning and intention of the parties with regard to the subject matter of the contract which, owing to the imperfections of language, it may be difficult or impossible to express in words."¹¹⁰

Thus, the proffering of a sample amounts to a non-verbal demonstration of the goods that the seller under the contract is required to deliver.¹¹¹ The sample may be extracted from the bulk, or it may be entirely separate from that bulk.

Once the sale is by sample, the seller, as in the other legal systems, is obliged to make sure that the bulk tendered corresponds with the sample in quality.¹¹² Compliance with a sample sometimes arises collaterally to other issues. In *Champanhac & Co. Ltd v. Waller & Co. Ltd*,¹¹³ for instance, the seller contracted to sell a quantity of balloons with "all faults and imperfections", a phrase apt to exclude

¹⁰⁷ This provision caused an uncertainty in the cases where contracts are reduced to writing, and the writing did not refer to a sample. In contrast with the Iranian law, in such cases parole evidence is not normally considered as an adequate evidence for proving that the sale has taken place by sample. See for instance, *Meyer v. Everth* (1814) 4 Camp. 22; *Ginner v. King* (1890) 7 TLR 140. But where the contractual description of the goods has no common or definite trade such evidence may be admissible to identify description with a sample. Accordingly, in the Australian case of *Cameron & Co v. Shutzkin Pty Ltd* (1923) 32 CLR 81, the seller sold "matchless No. 2475 39/40 white veil" under a written contract. The buyer was held to be entitled to identify the product by reference to a sample, despite the parties did not mention the sample in their contract.

¹⁰⁸ (1815) 4 Camp. 144.

¹⁰⁹ *Ibid.*, p. 145 per Lord Ellenborough.

¹¹⁰ (1887) 12 App. Cas. 284, 297.

¹¹¹ See S. Williston, *Sales* (rev. Ed. 1948), para. 250.

¹¹² S. 15(2)(a). See *Russell v. Nicolopulo* (1860) 8 CB (NS) 362, 2 LT 185, 141 ER 1206; *E. and S. Ruben Ltd v. Faire Brothers Ltd* [1949] 1 KB 254 (the fact that it is easy for the buyer to correct the fault is no defence).

¹¹³ [1948] 2 All ER 724.

his liability concerning merchantable quality,¹¹⁴ but not his separate obligation to supply a bulk in compliance with the sample in quality.

Of course, the parties may agree to require the seller to deliver goods which over and above description and satisfactory quality, contain enhancing quality present in the sample but are undetectable on an ordinary examination. But, unlike Iranian law, in the absence of such an agreement, the seller, in the event of a sale by sample, is not liable if the bulk does not correspond in quality with the sample, except as to those qualities, whether of the sample or of the bulk, that would be apparent from such examination as is normal in the trade. In this connection Lord Macnaghten states:

“The sample speaks for itself. But it cannot be treated as saying more than such a sample would tell a merchant of the class to which the buyer belongs, using due care and diligence, and appealing to it in the ordinary way and with the knowledge possessed by merchants of that class at the time. No doubt the sample might be made to say a great deal more. Pulled to pieces and examined by unusual tests which curiosity and suspicion might suggest, it would doubtless reveal every secret of its construction. But that is not the way business is done in this country.”¹¹⁵

Accordingly, in *Steels & Busks v. Bleecker Bik & Co. Ltd.*,¹¹⁶ a quantity of pale crepe rubber was supplied that, because of a preservative added in the course of its manufacture, stained material with which it came into contact. The court dismissed the claim that the seller was in breach of section 15(2)(a) for although the preservative was not present in the sample, its absence from the bulk could only have been verified by an extraordinary examination.¹¹⁷

As other implied terms under English system, this view seems to have been grounded on the principle of reliance which, in itself, is one the element of the law of tort under this system. In contrast, the seller's obligation as to quality of the goods in the case of sale by a sample under civilian as well as US law arises from the contract

¹¹⁴ Now satisfactory quality under section 15(2)(c) of the Sale of Goods Act 1979.

¹¹⁵ *James Drummond and Sons v. E. H. Van Ingen & Co Ltd*, *supra.*, note 61, p. 297.

¹¹⁶ [1956] 1 Lloyd's Rep. 228. See also *F. E. Hookway & Co Ltd v. Alfred Isaac & Sons* [1954] 1 Lloyd's Rep. 491.

¹¹⁷ It seems that the seller in this case could be held liable under section 15(2)(c) if the presence of preservative rendered the goods of un-merchantable quality (now unsatisfactory quality).

and therefore, he will be liable for any non-conformity of the bulk with the sample even if such a non-conformity cannot be discovered by ordinary examination.

In accordance with section 15(2)(c) in the case of a sale by sample, the seller will be liable for any latent defect which renders the goods unsatisfactory and which is not detectable by a reasonable examination of the sample. But his liability does not extend to those defects, which would be apparent on actual examination of the sample regardless of, whether the buyer in fact carried out such examination.¹¹⁸

¹¹⁸ See Sale of Goods Act 1979, Section 14(2C)(c) (as amended).

Chapter 2

Warranty of Quality under United States Law

Early US law bears the imprint of the English legacy of *caveat emptor*; the seller's liability as to the quality of the goods was limited to the cases of breach of an express warranty through which he had fraudulently induced the buyer to enter into the contract with him.¹ The doctrine of *caveat emptor* was supported by the fear of stifling the rapidly growing field of commerce and shaped by the fact that commercial transactions were conducted in face to face dealings.²

Nonetheless, as a consequence of the change in the nature of commercial transactions the doctrine of *caveat emptor* began to lose its authority. During the nineteenth century mass production and contracts of sale for future delivery of standard goods between distant parties became the norm. Goods became more specialised and diverse; thus, the assumption that each party to the contract had equal bargaining power and equal commercial experience was no longer appropriate. Transcontinental bargains became routine and the purchaser's opportunity to inspect the goods before the sale upon which the principle of *caveat emptor* is based, was rendered increasingly suspect. These changes resulted in a gradual retreat of the maxim of *caveat emptor*.³ As a consequence of this retreat the early common law requirement that all promises must be explicit was amended and accordingly, the existence of implied-in-fact warranty was recognised. Also during the nineteenth century a new concept was developed in the common law whereby even in the

¹ *Garrok v. Heytesbery*, Y.B. Trin 11 Rich. 2, pl. (1387); *Sexias v. Wood*, 2 Cai. R. 48 (N.Y. 1804). See further, Williston, *Sales* (2nd ed. 1924) vol. 1, p. 368; A. W. B. Simpson, *A History of Common Law of Contract: The Rise of the Action of Assumpsit* (Oxford : Clarendon Press, 1975) 246; Ames, "The History of Assumpsit", (1888) 2 *Harvard Law Review* 1.

² See, for example, *Hargous v. Stone*, 5 N.Y. 73 (1851) per Justice Paige at p. 89. See further, Sullivan, "Innovation in the law of warranty: The Burden of Reform" (1980) 32 *Hastings Law Journal* 341 at p. 346-50.

³ See generally Sullivan, *supra*, note 2, at p. 347-51; Kessler, "The Protection of the Consumer Under Modern Sale Law, Part 1, Comparative Study" (1964) 74 *Yale Law Journal* 262, 267-68.

absence of any agreement or representation or description in the contract, the goods delivered by the seller must be merchantable (implied-in-law warranty). This requirement, however, was not applicable to all cases,⁴ nor in all jurisdiction. Even those jurisdictions which adopted the concept of merchantability it was always deemed "exceptions" to the general principle of *caveat emptor*.

Throughout these changes, in contrast with the civilian systems, the concept of reliance by the buyer was considered as paramount under both implied and express warranties. Accordingly, where the buyer was given an opportunity to inspect the goods there would be no implied-in-law warranty as to defects, which ought to be disclosed by such inspection.⁵ Similarly, equal skill in the buyer would preclude him from protection afforded by the law as, in such a case he could not assert reliance upon the seller's skill.⁶ In the case of latent defects, there obviously might be justifiable reliance by the buyer even if he inspected the goods before being accepted by him, and the warranty arose.⁷ Williston, however, reported a tendency in the US cases to hold that inspection itself at the time of the bargain precludes the existence of any implied warranty, regardless of whether or not the defects are latent.⁸ Moreover, the fact that warranty in common law developed out of tort and had not yet become fully contractual precluded the aggrieved buyer from recovering damages on the basis of breach of warranties in some of the US jurisdiction without showing a proof of the seller's negligence.⁹ Finally, under the traditional US law, the seller could exclude the possibility of any implication of warranty or restrict the liability for its breach by stating that the seller has no personal knowledge of the goods sold, or by providing in the contract that goods are not warranted, or that they are sold as "it is".¹⁰ Any of these contractual clauses effectively excluded the seller's liability for the breach of express or implied warranties even if, unlike the civilian tradition, the

⁴ For example, the implied warranty that the goods delivered must be of merchantable quality was not applied to the cases where the seller was not manufacturer or dealer.

⁵ Williston, *supra*, note 1, at p. 453.

⁶ *Ibid.*, at p. 456.

⁷ *Ibid.*, at p. 454.

⁸ *Ibid.*

⁹ *Ibid.*, at pp. 466-468.

¹⁰ *Ibid.*, at p.

defects where know to the seller but he failed either negligently or fraudulently to reveal them to the buyer when the contract was made.

Warranty of Quality under Uniform Sales Act 1903

The need for a maximum of clarity and certainty in certain fields of commercial activity and an urgent demand for uniformity of the law in different jurisdictions of the United States by the end of the 19th century led the Commissioners on Uniform State Laws to approve the Uniform Sales Act in 1903. The intention of the legislators in approving this Act was to codify the "existing" common law. Nevertheless, the trend of limitation on the applicability of the principle of *caveat emptor* was greatly accelerated by its approval.¹¹

The Uniform Sales Act 1903 in main followed the UK Sale of Goods Act 1893, nonetheless, there are some outstanding difference between these two enactments. One of the difference between these Acts related to the use of the terms "warranty" and "condition". Under section 12 of the Uniform Sales Act 1903, the term "warranty" is very broad in meaning and refers to promises that is regarded as "condition" under English law.¹² This section regards a warranty as a promise, either express or implied-in-fact (from affirmation of fact). On the other hand, in contrast with the UK Act 1979, the term "condition" is used by the Act 1903 for the happening of some event about which the seller has made no promise. According to section 11(1) of the Act 1903, non-performance of a condition which has been *promised* by a party to happen may be treated as breach of warranty.

The Uniform Sales Act does not use the expression of "implied-in-fact", nevertheless, there is a tacit recognition that the seller is liable for making of voluntary declaration of will even though it may be indirect rather than express, in

¹¹ See A. Squillante & J. Fonseca, *Williston on Sales* 608 (4th ed. 1974) . As an example by adoption of the Uniform Sales Act, those jurisdictions in which the seller's liability on an implied-in-law warranty was limited to the situations where involved his fault, were forced to retreat this requirement and to regard it as not more material in cases of implied-in-law warranty than in cases of express warranty.

¹² See A. Squillante & J. Fonseca, *Williston on Sales* (4th ed. 1974) p. 366.

the same manner as he makes an express promise. In other words, affirmation of fact and expressly promissory words are to produce the same remedy to the buyer.

The other main features of the Act 1903 includes the following:

(1) The tort aspects of the warranty observed in its common law origin were retained; the affirmation of fact or the promise is regarded as a warranty only if its natural tendency is *to induce* the purchaser to buy the goods and only if he purchases the goods by *relying* thereon.

(2) Although the Act discarded the old common law requirement of the seller's intent to warrant, it retained the troublesome distinction between affirmation of fact and what is called mere statement of the seller's opinion.

(3) In contrast with the English system where the distinction developed by cases between present sales and contract to sell has been retained and developed by the courts, the drafters of the Act 1903 succeed to eliminate this distinction with regard to the quality of the goods sold.¹³

(4) As in the UK Act 1979, under sections 14 and 16 of the Act 1903, the warranties arising from "sales by description" and "sales by sample" have been designated mistakenly as "implied" rather than "express". Obviously, the seller, by describing of the goods in the contract or by agreeing to sell them in accordance with a the sample, indirectly declares his will that the goods delivered will correspond with the description and/or with the sample, and as such like any affirmation of fact are implied-in-fact in the sale which should be regarded as express warranties. It is to be noted that since express and implied (in fact and in law) warranties are treated alike by the Act 1903, this inaccuracy of analysis is not important in practice under the common law. However, it makes a considerable difference in those jurisdictions where it is held that implied warranties are eliminated by express warranties,¹⁴ or where the remedies available to the buyer for the breach of express warranties differs from those for breach of implied warranties.

¹³ Llewellyn, "On Warranty of Quality, and Society", (1936-1937) 36 *Columbia Law Review* 699.

¹⁴ See, for example, the case of *Slinger v. Totten*, 38 S.D. 249, 160 N.W. 1008 (1917) in South Dakota.

- (5) Finally, under section 15(2) of the Act 1903, the warranty of merchantability applies only to cases where the goods are purchased by description from the seller who deals in the goods of that description, although he does not need to be the grower or manufacturer for the warranty to arise.

Warranty of quality of goods under the Uniform Commercial Code (UCC)

The inadequacy of the remedies afforded under the Uniform Sales Act and the common desire for improving the protection of the buyer and as well as the need for a uniform modern code of commercial law to govern commercial transactions in the United States of America¹⁵ led to adoption of the UCC in replacement of the Uniform Sales Act. Although most of the substance of the Uniform Sales Act has been incorporated into Article 2 of the UCC, it has been completely rewritten, with the making of numerous revisions and the insertion many new provisions. In this chapter it is intended to explore the law of warranty of quality under the new US commercial code in order to find out if there has been any progress in achieving of these goals.

Express warranties

An express warranty is a representation made by the seller to a buyer that relates to the quality or performance of the goods sold. The seller is required to deliver goods that conform to his representations in the sale, unless he can show that those representations did not create an enforceable express warranty.

Express warranties under the UCC are governed by section 2-313, which provides that:

“(1) Express warranties by the seller are created as follows:

- (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
- (b) Any description of the goods which is made part of the basis of the bargain

¹⁵ See Stasney “III, UCC Implied Warranty of Merchantability and Used Goods” (1974) 26 *Baylor Law Review* 632 at p. 633.

creates an express warranty that the goods shall conform to the description.

(c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty."

As can be seen, the UCC is identical with the Uniform Sales Act in stating that the express warranty consists of "any affirmation of fact or any promise relating to the goods" which contributes to and is instrumental in concluding the transaction. An affirmation of fact or promise relating to the subject matter of the sale represents the most common way of making an express warranty under the common law. These types of express warranties can be created by written sales contracts,¹⁶ advertisements,¹⁷ owner's manuals,¹⁸ brochures,¹⁹ repairs logbooks,²⁰ or oral representations.²¹

The scope of express warranties under the UCC, however, has been expanded to include any description of the goods, as well as any sample or model which is made

¹⁶ See, e.g., the case of *Massey-Ferguson, Inc. v. Laird*, 432 So. 2d 1259, 1261-1262, 36 UCC Rep. 437, 440 (Ala. 1983) in which the court found that the express warranty included in the sale agreement.

¹⁷ See, e.g., *Pake v. Byrd*, 55 N.C. App. 552-553, 286 S.E.2d 588, 589, 33 UCC Rep. 835, 836-837 (1982) (An advertisement by the seller that the tractor was in "good condition" was held to constitute an express warranty); *McGregor v. Dimou*, 101 Misc. 2d 756, 760, 422 N.Y.S.2d 806, 810, 28 UCC Rep. 66, 70-71 (N.Y. Civ. Ct. 1979) (The seller's advertisement that the car was in "very good condition" held to be an express warranty); *Yost v. Millhouse*, 373 N. W. 2d 826, 829, 41 UCC Rep. 1623, 1626 (Minn. Ct. App. 1985) (advertisement stated house was registered was found as an express warranty).

¹⁸ See for example, *Cuthbertson v. Clark Equip. Co.*, 448 A.2d 315, 321, 34 UCC Rep. 71, 74-75 (Me. 1982). In this case, it was expressed that statements in the owner's manual affirming quality of the goods could be affirmation of fact. Nevertheless, because of the lack of the buyer's reliance on those statements, he was held not to be entitled to sue the seller for breach of express warranty in the sale.

¹⁹ See *Keith v. Buchanan*, 173 Cal. App. 3d 13, 21-22, 220 Cal. Rptr. 392, 396-397, 42 UCC Rep. 386, 391-392 (1985). In this case, the statement describing the boat as "seaworthy" and "well equipped" in the brochure was regarded by the court as constituting an express warranty by the seller.

²⁰ See *Limited Flying Club, Inc. v. Wood*, 632 F.2d 51, 56, 29 UCC Rep. 1497, 1502-1503 (8th Cir. 1980), in which the inspection and repair history of aircraft given in the logbook was held to constitute an express warranty.

²¹ In the case of *Leininger v. Sola*, 314 N.W.2d 39, 43-44, 33 UCC Rep. 191, 197-198 (N.D. 1981), for example, the seller was held to be liable for an express warranty resulting from his oral statement that the cows sold were pregnant.

part of the basis of the bargain by the parties to the transaction.²² This expansion in the scope of the express warranty is a realistic appraisal of the making of the contract of the sale. A contract is normally a contract for a sale of something describable and described. Like affirmations of fact, descriptions may exist in brochures,²³ owner's manuals,²⁴ advertisements,²⁵ and sales agreements.²⁶ Additionally, they may exist in invoices²⁷ and letters²⁸ received by the purchaser. Moreover, unlike affirmations of fact, an express warranty by description can be created by the purchaser by providing specifications to which the goods purchased must conform. In the case of *Northern States Power Co., v. ITT Meyer Industries*,²⁹ for example, the court decided that the buyer's proposed technical specifications adopted in the sale contract created an express warranty by description.

According to section 2-313(c) of the UCC, samples or models presented to the buyer are, unlike the Sale of Goods Act 1979, considered to form express warranties in the sale. The official commentary distinguishes a sample from a model: "This section includes both a 'sample' actually drawn from the bulk of goods which is the

²² A language variation exists in Code, Section 2-313 (1) whereby clause (a) states, "promisebecomes part of the basis of the bargain," whereas clauses (b) and (c) read "description, sample or model ...is made part of the basis of the bargain." This variation should not be significant as the essential fact is the agreement made by the parties and embraces the element in question.

²³ In the case of *Keith v. Buchanan*, 173 Cal. App. 3d 13, 22, 220 Cal. Rptr. 392, 397, 42 UCC Rep. 386, 391 (1985), for example, a statement in the brochure which described the boat as "picture of sure-footed seaworthiness" was found to form express warranty by description. Similarly, in *AFA Corp. v. Phoenix Closures, Inc.*, 501 F. Supp. 224, 228-29, 30 UCC Rep. 81, 85-86 (N.D. Ill.1980), specifications of the product in bulletins distributed by the seller were considered as express warranties created by descriptions.

²⁴ See *Cuthbertson v. Clark Equip. Co.*, 448 A.2d 315,321, 34 UCC Rep. 71, 74-75 (Me.1982), e.g., in which the owner's manual description of the goods were considered as constituting express warranty.

²⁵ For example, in *Jensen v. Seigel Mobile Home Group*, 105 Idaho 189, 195, 668 P.2d UCC Rep. 804, 814 (1983), the seller was held to be liable for breach of express warranty by description resulted from his advertising material which made numerous descriptions of mobile home features.

²⁶ In the case of *In re Barney Schogel, Inc.*, 34 UCC Rep. 29, 46 (Bankr. S.D.N.Y. 1981), e.g., the specifications of the goods purchased were provided in the sale agreement.

²⁷ See, e.g., *Superior Wire & Paper Prods., Ltd. v. Talcott Tool & Mach., Inc.*, 184 Conn. 10, 18-19, 144 A.2d 43, 47-48, 31 UCC Rep. 101, 107-108 (1981) in which the court held that an invoice giving a product's specifications generally creates an express warranty but when an invoice contains conflicting descriptions, the existence of warranty is a question which is to be decided by the jury.

²⁸ AS an example, in *Motley v. Fluid Power of Memphis, Inc.*, 640 S.W.2d 222, 224-225, 35 UCC Rep. 1141, 1143-1144 (Tenn. Ct. App. 1982), the letter describing operation of clothing press machine was found to have created express warranty by description.

²⁹ 777 F.2d 405, 411-412, 42 UCC Rep. 1, 10-11 (8th Cir. 1985).

subject matter of the sale, and a 'model' which is offered for inspection when the subject matter is not at hand and which has not been drawn from the bulk of the goods."³⁰ In *Amtel, Inc. v. Arnold Industries, Inc.*,³¹ for example, the seller produced threaded steel cones as a component for the buyer's log-splitting machine. The buyer approved a test-run batch and ordered 1,500 cones. The court held that the case "involve[d] a 'model,' rather than a 'sample,' for when the cones in the 'test run' were produced, the bulk of the goods ultimately sold had not yet even been created."³² However, a sample drawn from the bulk of the goods sold "must be regarded as describing values of the goods contracted for unless it is accompanied by an unmistakable denial of such responsibility," whereas "the merchantable presumption that [a model] ...has become a literal description of the subject matter is not so strong."³³ In other words, an express warranty can be created more easily by samples than by models.

Both a pre-UCC decision³⁴ and the UCC are in accord that such formal words as "warrant" or "guarantee" are not necessary for the creation of an express warranty, nor that the seller has a specific intention to make a warranty.³⁵ Furthermore, no particular word or form of expression is necessary to create an express warranty, and a positive assertion by the seller of a matter of fact, which becomes part of the "basis of the bargain", constitutes a warranty. However, according to section 2-313(2) of the UCC:

"[A]n affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty."

³⁰ UCC, Sec.2-313, Comment 6.

³¹ 31 UCC Rep. 48 (D. Conn. 1980).

³² *Ibid.*, at p. 56; see also *Automated Controls, Inc. v. MIC Enters., Inc.*, 27 UCC Rep. 661, 669 (D. Neb. 1978), *aff'd*, 559 F.2d 288, 27 UCC Rep. 677 (8th Cir. 1979), in which in-house test of an electronic control system demonstrated to the buyer was found to be a sample. Similarly, lining materials supplied to the buyer in the case of *AFA Corp. v. Phoenix Closures, Inc.*, 501 F. Supp. 224, 228, 30 UCC Rep. 81,85-88 (N.D. Ill. 1980) was held to be a sample.

³³ UCC, Sec.2-313 Comment 6.

³⁴ *Beckett v. F. W. Woolworth Co.*, 376 Ill. 470, 34 N.E.2d 427 (1941).

³⁵ UCC, Sec.2-313(2)

In other words, the law has explicitly recognised that some of the statements made by the seller are only puffing which create no liability for the seller in the contract of sale. Like its predecessor, however, the UCC provides no clear standard for determining when a statement is one of the fact amounting a warranty, or is a statement of opinion under section 2-313(2). Of course there are some factors which might be helpful in suggesting that a statement is a warranty as opposed to only a "puff". The specificity of the statement made by the seller, for example, is an important factor in determining whether or not the statement constitutes an express warranty. The more specific a statement, the more likely it be considered as a warranty. Similarly, a written statement is more likely to pass as a warranty than an oral one, and a written statement in the contract of the parties is more likely to pass as a warranty than a written statement in an advertisement. Nevertheless, a careful study of the cases in this regard reveals that none of these and other similar factors are decisive for the courts and that the puffing-warranty distinction is highly intractable.³⁶ According to these cases, it is very difficult to label a seller's statements as puffs or not puffs without carefully examining such factors as the nature of the defect (was it obvious or not) and the buyer's and seller's relative knowledge.³⁷ The

³⁶ For example, in *Frederickson v. Hackney*, 159 Minn. 234, 198 N.W. 806 (1924) (statements by the seller that a bull calf would "put the buyer on the map" and that "his father was the greatest living dairy bull" were found to be only trade talk, not a warranty of productive capacity), while, in *Wat Henry Pontiac Co., v. Bradely*, 202 Okl.82, 210 P.2d 348 (1949), an oral statements of the salesman of a used car purporting that the car is in "A-1 shape" and "mechanically perfect" held to be express warranties, despite the fact that such an oral statements by used car salesman could be said to be notoriously unreliable, archetypal puffs. See further, *Olin Mathieson Chem. Corp. v. Moushon*, 93 Ill. App.2d 280, 235 N.E.2d 263, 5 UCC 363 (1968) (the seller's representation that quality of the explosive was good, that good results would be obtained, etc., held to be only an expression of the seller "opinion"); *Continental Sand & Gravel, Inc. v. K & K Sand Gravel, Inc.*, 755 F.2d 87, 40 UCC 387 (7th Cir.1985) (statement that the goods were "in good order, condition, and repair" created express warranty); *Wullschleger & Co., Inc. v. Jenny Fashions, Inc.*, 618 F.Supp. 373, 41 UCC 1213 (S.D.N.Y.1985) (statement by the seller that fabric was of "first quality" found to be an express warranty).

³⁷ In determining whether affirmations or representations constitute a warranty or a statement of the seller's opinion or judgement, it has been stated in *Keller v. Flynn*, 346 Ill. App. 499, 105 N.E.2d 532 (1952), that the decisive test is whether the seller assumes to assert a fact of which the buyer is ignorant, or merely states an opinion or judgement on a matter of which the seller special knowledge, and on which the buyer may be expected to have an opinion and to exercise his judgement. This test has been followed by the post-Code cases such as *General Supply & Equipment Co., Inc. v. Phillips*, 490 S.W.2d 913, 12 UCC 35 (Tex.Civ.App.1972); *Royal Business Machines, Inc. v. Lorraine Corp.*, 633 F.2d 34, 30 UCC 462 (7th Cir. 1980); *Overstreet v. Norden Laboratories, Inc.*, 669 F.2d 1286, 33 UCC 174 (6th Cir. 1982).

cases also suggest that the nature of the buyer's reliance is not as irrelevant as the UCC and comments³⁸ appear to say it is. Some cases have gone even further by considering the puff-warrant question as a backdoor means of examining the nature and reasonableness of the buyer's reliance on the statements of the seller in the contract.³⁹ This approach was adopted, e.g., in the case of *Price Brothers Co. v. Philadelphia Gear Corp.*,⁴⁰ where the trial court argued:

"In order to determine whether the pre-contract statements... were in fact a basis of the bargain and thus an express warranty, or whether they were merely a seller's 'puffing', the court should consider the reasonableness of the buyer in believing the seller, and the reliance placed on the seller's statements by the buyer."⁴¹

In this case the court tried to propose an objective approach in considering whether the seller's statements constitute a basis of bargain or they are merely a puffing by him. Nonetheless, this approach does not seem to be tenable as any statement with regard to the quality of the goods by the seller is, in one way or other, effective in inducing the buyer to purchase the goods. It is absurd to say that a statement made by a prudent seller is not beneficial to him at all. Accordingly, it is unjust and irrational to allow the seller to escape from liability where he fails to deliver goods which conform to his own statements made in the contract by asserting that the statements are only his "opinion" as opposed to warranties. In short, the recognition by the UCC that some statements are not warranties has been the cause of much uncertainty in the commercial field, which in the final analysis tips the balance of interests between the parties in favour of the seller.

The UCC emphasises that express warranties are created by the seller during the facts of negotiation, as contrasted with the Uniform Sales Act definition of an express warranty. In fact, the precise time when statements of fact about the goods are made "is not material"⁴² under the UCC. Rather, the sole question is whether such

³⁸ UCC, Section 2-313, Comment 3. For the full text of this Official Comment see Appendix I.

³⁹ The pre-UCC requirement of reliance was replaced by the section 2-313 of the UCC with the ambivalent requirement of "part of the basis of the bargain".

⁴⁰ *Price Brothers Co. v. Philadelphia Gear Corp.*, 649 F.2d 416, 31 UCC 469, 474 (6th Cir.1981), cert. denied, 454 U.S. 1099, 102 S.Ct. 674, 70 L.Ed.2d 641 (1981).

⁴¹ *Ibid.*

⁴² UCC, Sec. 2-313 Comment 7.

affirmations of fact "are fairly to be regarded as part of the contract."⁴³ Comment 3 to section 2-313 states that: "affirmations of fact made by the seller about the goods *during a bargain* are regarded as part of the description..." and, thus, create express warranty under the UCC.

As pointed out earlier, an advertisement can be part of the basis of the bargain as it is fair that it be so. It has been, however, argued that an advertisement is not normally considered to have been made "during a bargain," in the usual case, and therefore, no statement in an advertisement would be qualified to form part of the contract under the language of Comment 3. It is suggested that in such circumstances, the plaintiff - purchaser should be required to demonstrate that he knew and relied upon an advertisement in making the purchase. This view was adopted by the trial court in *Interco, Inc. v. Randustrial Corp.*⁴⁴ In this case, the court eventually decided that the language in the seller's catalogue which stated that the floor-covering product would "absorb considerable flex without cracking" created an express warranty under section 2-313 of the UCC.⁴⁵ The court argued that "...the catalogue, advertisement or brochure must at least been read"⁴⁶ by the buyer before they could be regarded as constituting an express warranty in the contract of sale "as the UCC requires the proposed express warranty be part of the basis of the bargain."⁴⁷ One may respond to this argument by pointing out that the seller is the only person who normally gets benefit from his advertisement concerning the quality of the goods. Consequently, in the absence of an express agreement to the contrary, the seller should reasonably bear also the responsibility if it transpires that goods do not correspond with the advertisement. In fact, the price of the quality of the goods represented by the advertisement is included in the purchase price paid by the buyer even though he did not notice the representation. Therefore, the fact that the buyer did not know about the advertisement before the conclusion of the contract should

⁴³ *Ibid.*

⁴⁴ 553 S.W.2d 257, 19 UCC 464 (Mo. App.1976).

⁴⁵ *Ibid.* at 263, 19 UCC at 471.

⁴⁶ *Ibid.*, at 262, 19 UCC at 470

⁴⁷ *Ibid.*

not be taken as an excuse to deprive him from the protection afforded to him under the UCC.

Statements with regard to the quality of the goods made by the seller after the conclusion of the sale have also been a source of uncertainty and dispute among the commentators of the UCC.⁴⁸ The problem is caused by the ambiguity of the UCC's requirement of "the basis of the bargain", under section 2-313, since it is unclear whether this requirement incorporates the pre-UCC test of the buyer's reliance.⁴⁹ It might be argued that after the conclusion of the sale, no additional statement by the seller could be made part of the basis of the bargain of the parties. Since the buyer has already agreed to the transaction and, therefore, he may not assert his reliance on the additional statement in making the deal with the seller. One may appropriately respond to this argument by pointing out that in the merchandising world a buyer, even one already legally obligated to purchase, has greater rights whilst he is still standing at the seller's counter than he does some time later. As an example, a buyer may decide not to use his statutory right to reject the defective goods when he receives a further statement from the seller assuring the buyer the quality of the goods, or indicating that they may also be used for a particular purpose. Under section 2-607(2) of the UCC, such a buyer would lose his right to reject after acceptance of the goods. In such circumstances, it would seem inconceivable not to consider the seller's post-sale statement as an express warranty since by this statement he induced the buyer not to use his statutory right to reject the defective goods.

A novel solution to the problem of post-sale statements by the seller has been provided by Comment 7 to section 2-313:

⁴⁸ See, e.g., *Byrd Motor Lines, Inc. v. Dunlop tire & Rubber Corp.*, 63 N.C. App. 292, 304 S.E.2d 773, 36 UCC 1169 (1983), review denied, 310 N.C. 624, 315 S.E.2d 689 (1984) (recommendations on ways to increase tire life made by the seller two years after the sale was held not constitute an express warranty); *Terry v. Moore*, 448 P.2d 601 (Wyo.1968) (a driller's statement made after conclusion of the contract and after completion of drilling, that a well would produce a certain output held not express warranty since it was not considered to form part of the basis of the bargain as required by section 2-313 of the UCC).

⁴⁹ See Murray, "Basis of the Bargain": Transcending Classical Concepts, (1982) 66 *Minnesota Law Review*, 283.

"If language is used after the closing of the deal (as when the buyer when taking delivery asks and receives an additional assurance), the warranty becomes a modification and need not be supported by consideration if it is otherwise reasonable and in order (section 2-209)."

Under Comment 7, in other words, the parties will have a new bargain which is based partly on the modified warranty which, unlike the traditional common law, does not need to be supported by consideration when the seller utters a description or affirmation after conclusion of the sale.

The basis of the bargain

The pre-UCC requirements of inducement of and reliance by the buyers have been replaced by the drafters of section 2-313 with the theory of the "basis of the bargain".⁵⁰ This section considers the promises, affirmations, descriptions, samples, or models as creating an express warranty when they become "part of the basis of the bargain" without expressly requiring the buyer to demonstrate his actual reliance on them. The deliberate exclusion of the reliance requirement from the definition of an express warranty signalled a significant change from the Uniform Sales Act which appears to have been made in line with the policy of extension of the protection afforded to the buyer under the traditional common law. Section 2-313 and the Official Comments, however, failed to clarify when the seller's statements are regarded to have become "part of the basis of the bargain" between the parties as it is required by the UCC, leaving courts without a specific standard to apply in breach-of-express warranty cases. In confronting the mysterious clause of "the basis of the bargain" some courts simply ignore the UCC's deletion of reliance and hold that reliance continues as a requirement, while others assert that under this clause the buyer does not need to rely on the representations made by the seller in order that they become part of the deal between the parties. It is intended in this section to discuss the problem of the various interpretations of the basis-of-the-bargain clause, devoting particular attention to those tests purporting to incorporate the

⁵⁰ See Andrew M. Baker *et al*, Article Two Warranties in Commercial Transactions" (1978) 64

commentary's "no particular reliance" provisions.⁵¹ The section will continue to present its own interpretation of the basis-of-the-bargain requirement. Finally, the section will propose a standard for applying the requirement in express warranty cases. The discussion incorporates the goals of the section 2-313, which are to extend the traditional common law protection of the buyer by easing his burden of proof in a suit against the seller for breach of an express warranty and by protecting the former expectations created by the seller's representations.

Reliance and basis of the bargain test

As pointed out earlier, ambiguity of the "basis of the bargain" clause under section 2-313 of the UCC caused some of the courts to maintain the buyer's reliance as a necessary factor in creating an express warranty in the sale. These courts are, however, divided on the nature of the requirement of the buyer's reliance on the statements made by the seller in respect of the quality of the subject matter of the sale. Some courts interpret the basis of the bargain clause as shifting to the seller the burden of proving the buyer's reliance. Others reject a reliance requirement but substitute an awareness or inducement standard.

Shifting the burden of proof to the seller

As pointed out earlier, in addressing the issue of the "reliance" some courts and commentators refer to the official commentary of the UCC and maintain that by the exchange of the "basis of the bargain" language for the old "reliance" language, the drafters of the UCC merely shifted to the seller the burden of proving the buyer's reliance. The relevant provision states:

"In actual practice affirmations of fact made by the seller about the goods during a bargain are regarded as part of the description of the goods; hence no

Cornell Law Review 30, 50.

⁵¹ See UCC, Section 2-313 Comment 3.

particular reliance on such statements need be shown in order to weave them into the fabric of the agreement"⁵²

This construction rests primarily on comment 3's statement that "any fact which is to take such affirmations, once made, out of the agreement requires clear affirmative proof."⁵³ In the case of *Indust-Ri-Chem Laboratory, Inc. v. Par-Pak Co.*⁵⁴ the court adopted this view by ruling that the seller, who showed proof of the buyer's lack of reliance was entitled to a jury instruction on reliance.⁵⁵ The court pointed out that the UCC does not require an affirmative reliance test,⁵⁶ nevertheless, after confronting the difficult problem of the buyer who knew that the seller's representation was false, the court stated that such a "representation cannot be part of the basis of the bargain", and, accordingly, "in some instances a jury instruction on *lack of reliance* may be germane to the basis of the bargain issue."⁵⁷ The court ordered the instruction to place the burden of proving the buyer's lack of reliance on the seller.

The reasoning of the court in this case contains several flaws. The court on the one hand rejected the requirement of reliance,⁵⁸ while on the other hand, it allowed the seller to escape from the liability for breach of an express warranty resulting from his statements by showing that the buyer failed to rely on the statements.⁵⁹ Under the court's reasoning in *Indust-Ri-Chen*, the buyer still risks losing his claim if the seller can demonstrate a lack of reliance. Therefore, in order to succeed on his warranty claim the buyer must have relied on the statements made by the seller in the contract.

The decision in *Indust-Ri-Chem* is mainly based on the argument that comment 3's "clear affirmative proof"⁶⁰ requirement for removing a seller's representation from the agreement meant proof that the buyer failed to rely. Because the previous line in

⁵² UCC, Section 2-313 Comment 3.

⁵³ UCC, Section 2-313 Comment 3.

⁵⁴ 602 S.W.2d 282, 29 UCC Rep. 794 (Tex. Civ. App. 1980).

⁵⁵ *Ibid.*, at 293-294, 29 UCC Rep. at 810-811.

⁵⁶ *Ibid.*, at 293, 29 UCC Rep. at 809.

⁵⁷ *Ibid.*, at 293, 29 UCC Rep. at 810 (emphasis added).

⁵⁸ *Ibid.*, at 293, 29 UCC Rep. at 811.

⁵⁹ *Ibid.*, at 294, 29 UCC Rep. at 811.

⁶⁰ UCC, Section 2-313 Comment 3.

Comment 3 states that "no particular reliance on such statements need be shown,"⁶¹ however, the assertion that lack of reliance by the buyer on the statements made by the seller will rebut the statements from being part of the agreement between the parties appears un-plausible. Rather, the seller is required by the "affirmative proof" clause to show that the buyer could not reasonably have understood the statements to be within the context of the transaction. This standard can be satisfied by evidence, which shows that the buyer knew that the seller's statements about the quality of the goods were false or mistaken,⁶² or that the latter had effectively withdrawn his statements from the agreement.⁶³ As Professor Murray pointed out, in such instances, the buyer does not expect the goods to conform to these statements.⁶⁴ For such statements never enter into the agreement between the parties, as is required by section 2-313 of the UCC, not because the buyer failed to rely, but "the buyer's knowledge forecloses any such expectation."⁶⁵ Of course, there is no reliance by the buyer who knew that the seller's statements concerning the quality of the goods were false or mistaken, nevertheless, the *Indust-Ri-Chem* court's reliance analysis needlessly creates the possibility that the other classes of buyers may have their warranty protection curtailed.

The consideration standard

The section 2-313's test of "the basis of the bargain" and its Comment 3 have been interpreted by other courts as requiring the buyer at least to consider the seller's statements concerning the quality of the goods before entering into the contract of the sale with the latter. In other words, only in the cases where these statements have been taken into consideration prior to the conclusion of the sale, would the buyer be

⁶¹ *Ibid.*

⁶² See *Price Bros. Co., v. Philadelphia Gear Corp.*, 649 F2d 416, 422-23, 31 UCC Rep. 469, 474-475 (6th Cir. 1981). In this case, the buyer's expertise and familiarity with the product was found to preclude the seller's statements concerning the quality of product from becoming part of "the basis of the bargain" as required by section 2-313 for creating of an express warranty

⁶³ See, e.g., *McGhee v. GMC Truck & Coach Division*, 98 Mich. App. 495, 500, 296 N.W.2d 286, 289, 30 UCC Rep. 121, 125 (1980), in which case the court concluded that the buyer, who was an experienced truck mechanic understood that no warranties were given on tractor's running parts.

⁶⁴ See J. E. Murray, *op. cit. supra.*, note 49, at pp. 294-295.

able to establish his warranty claim against the seller.⁶⁶ Nonetheless, the courts are divided on how to apply the consideration test. Some courts apply the consideration test objectively, requiring only that the representations be noticed by the buyer before completion of the sale.⁶⁷ The other courts apply this test subjectively requiring the buyer to show that he has been at least partly induced by the seller's representations to purchase the goods.⁶⁸ Both of these standards, however, seem to be inconsistent with the provisions of the UCC and its official comments.

Comment 3 of the section 2-313 states that, a seller's affirmations of fact "are regarded as part of the description of those goods" and as such become part of the basis of the bargain under the UCC. In other words, by presuming that all statements with regard to the quality of the goods by the seller create express warranties and by providing that "no particular reliance on such statements need be shown" by the buyer, the language of this comment has virtually eliminated the pre-UCC requirement of the reliance. Since the UCC does not require the buyer to show his reliance on the seller's representation, he should not need to know that such representation exists. As Professor Nordstrom expresses Comment 3 has, in fact, directed the inquiry of whether an express warranty was made away from the buyer's awareness of the representation and towards a factual examination of the seller's representations.⁶⁹ The seller who creates an express warranty by affirmation of fact, description, or sample or model, therefore, should not escape liability simply because the buyer, fortuitously, failed to hear the representation or to see a brochure or advertisement describing the product. Once the seller injects the express warranty into the bargain with the buyer, Comment 3 creates a presumption that the latter has relied on the warranty.⁷⁰ The seller should not be

⁶⁵ *Ibid.*, at p. 295.

⁶⁶ See *Perfetti v. McGhan Medical*, 99 N.M. 645, 652, 662 P.2d 646, 653, 35 UCC Rep. 1472, 1477 (1983).

⁶⁷ See, for example, *Massey-Ferguson, Inc. v. Laird*, 432 So. 2d 1259, 1261; 36 UCC Rep. 437, 440 (Ala.1983) See *Ibid.*, at 1261, 36 UCC Rep. at p. 440.

⁶⁸ See, for example, *Keith v. Buchanan*, 173 Cal. App. 3d 13, 23; 220 Cal. Rptr.392, 398; 42 UCC Rep. 386, 393 (1985).

⁶⁹ See R. Nordstrom, *Handbook of the Law of Sales* (1970) § 68, at 208-210.

⁷⁰ See Murray, *supra*, note 49 at 210.

allowed to rebut this presumption, unless he can show that the buyer could not have understood these representations to be express warranty.⁷¹

Similarly, the inducement requirement cannot be reconciled with the language of Comment 3. Since the buyer could not be said to have been induced by the representations without reliance on the representations in making of his decision while, as mentioned above, this Comment has virtually eliminated both the need for the buyer reliance and the need for him to know that the representation existed.⁷² If the buyer is not required even to know that the representations exists, then he certainly has no duty to show that he has been induced by the seller's representations, since one cannot rely on something which is not known to him. Moreover, the inducement standard defeats section 2-313's goal of easing the buyer's burden of proof. As mentioned earlier, this section relieved the buyer from the pre-UCC burden of proving that he relied on the seller's representations by removing the term "reliance" and replacing it with a requirement that these representations become part of the "the basis of the bargain" between the parties. Comment 3 of this section shifted the burden of proof to the seller by stating that: "any fact which is to take such affirmations, once made, out of the agreement requires clear affirmative proof." This clause requires the buyer only to show that "the seller made a statement of fact relating to the goods. It is presumed that such a statement becomes part of the 'agreement.'"⁷³ In other words, under section 2-313 of the UCC, the buyer is required only to show that the seller made a representation concerning the quality of the product and, therefore, he has no duty to show to what extent, if any, the representations entered into his decision to purchase the goods.

⁷¹ According to Professor Nordstrom: "The words used by the seller must be read in the way in which the buyer should reasonably have understood them." See R. Nordstrom, *supra.*, note 69, § 68, at 210.

⁷² See R. Nordstrom, *supra.*, note 69, § 68, at pp. 208-209. Professor Nordstrom noticed that decisions of those courts that regard representations unknown to the buyer as being part of the basis of the bargain under section 2-313 and thereby creating of an express warranty states, are consistent with the UCC. According to him:

"The court's task is to determine whether that injury was caused by the defect in the product, and any statements made by the seller designed to induce the public to buy his product are relevant in making determination." *Ibid.*, at 209.

In other word, Professor Nordstrom asserted that the inquiry of inducement by the seller's representations must be shifted from the individual purchaser at issue to the public at large.

⁷³ Murray, *supra.*, note 49, at p.287.

In short, the consideration test is inconsistent with the goal of the section 2-313 in easing the buyer's burden to prove that the seller's statements with respect of the quality of the goods created an express warranty. Under the consideration standard, the buyer is essentially required to establish that he relied on the representations made by the seller in the contract of sale. By replacing the pre-UCC principle of the reliance by the buyer under section 2-313, however, the buyer should not even be required to prove that he purchased with any knowledge of the seller's representations.

The doctrine of no-reliance on the seller's representations

The cases, which have so far been examined, indicate that despite the courts' attempt in interpreting Comment 3 in making of their decisions, they actually failed to articulate a standard to apply the basis of the bargain provision under the UCC.⁷⁴ One may achieve this goal only by defining the phrase "part of the basis of the bargain" as used in section 2-313. It appears that the drafters of the UCC intended the phrase to mean an inclusion of the seller's representations in the "commercial relationship" between the parties. The representations made by the seller will, accordingly, create an express warranty whenever they enter into commercial relationship between him and the buyer.

This definition is based primarily on the section 2-313's usage of the term "bargain" which is extended beyond the bounds of the traditional concept of "contract". As Professor Nordstrom puts it:

"A 'bargain' is not something that occurs at a particular moment in time, and is forever fixed as to its content; instead, it describes the commercial relationship between the parties in regard to this product ... The Code's word is 'bargain' - a process which can extend beyond moment in time that the offeree utters the magic words, 'I accept'."⁷⁵

In other words, the drafters of section 2-313 of the UCC have extended its scope to cover the entire span of the parties' commercial relationship. This relationship can

⁷⁴ In this regard, Professor Murray states: "A summary of the case law adumbration of "the basis of the bargain" reveals mass confusion and little assistance" See Murray, *supra.*, note 49 at p.287.

begin before the start of negotiations by the parties for making an agreement of sale or after completion of the sale agreement.⁷⁶

The provision of the basis of the bargain, as used in section 2-313 of the UCC, is an objective requirement under which the court should determine whether the seller provided a representation concerning the quality of the goods. The buyer should not need to prove that he entered into agreement of the sale with the knowledge of, or reliance on, the representations made by the seller, because, as Comment 3 demonstrates, the drafters of the UCC have intended to eliminate completely the need for reliance on, or consideration of, the seller's representations by the buyer. The mere affirmation or description or display of sample or model relating to the goods by the seller creates an express warranty⁷⁷. Once the buyer proves this, he may recover damages from the seller if he discovers that the goods delivered do not conform to seller's representations.

This expansive notion of bargain has been supported by Comment 7 which, unlike English law, ratifies the existence of post-sale warranties by expressing that the "precise time" when the representations is made by the seller is irrelevant. Accordingly, like pre-sale representations, the seller's post-sale representation concerning the product's quality may create an express warranty without being relied on by the buyer of the goods.

Under Comment 7 it is further provided: "If language is used after the closing of the deal ... the *warranty* becomes a modification, and need not be supported by consideration if it is otherwise reasonable and in order."⁷⁸ In other words, it could be assumed that a post-sale representation creates an express warranty, which, unlike the Sale of Goods Act 1979, does not require the support of a consideration, by the buyer. According to Professor Nordstrom, the modification requires no consideration because "it is reasonable to assume that a buyer would agree to an expansion of his warranty protection."⁷⁹ Unlike this view, however, some courts have found that post-

⁷⁵ R. Nordstrom, *supra.*, note 69, § 67 at p. 206-207.

⁷⁶ *Ibid.*, at p. 206.

⁷⁷ Murray, *Supra.*, note 49 at p. 287.

⁷⁸ UCC Section 2-313 Comment 7.

⁷⁹ R. Nordstrom, *supra.*, note 69, § 67, at p. 207.

sale representations would not create express warranties, as they were not relied on by the buyer in purchasing of the goods.⁸⁰ In the case of the *Global Truck & Equipment Co., v. Palmer Machine Works, Inc.*⁸¹, e.g., the court argued that a sales brochure describing the features of the goods did not become part of the basis of the bargain as required by section 2-313 for creating an express warranty, for the buyer received the brochure only after the conclusion of the contract. "If the buyer is not aware of the affirmation of fact and there is no evidence of any reliance on such affirmation, then it would seem that the mutual assent requirement⁸² is not met such that a binding modification does not exist."⁸³ This decision, however, contradicts with both Comments 3 and 7, under which the seller's representations, irrespective of the buyer's reliance or the precise time when they made, are considered to constitute part of the basis of the bargain by the parties as required by section 2-313 for creating of express warranties.

According to Professor Murray, the courts should enforce the warranties resulting from the post-sale representations to protect the buyer's "reasonable expectations that a seller's statements create, regardless of when those statements were made or when the buyer learned of them."⁸⁴ The same argument applies to the warranties created by the seller's pre-contract representations, which did not come into the buyer's notice until after entering into the contract of sale.⁸⁵ The buyer who receives an owner's manual or other product description with the purchase "will feel oppressed and unfairly surprised if the goods do not contain the features represented

⁸⁰ See e.g., *Anderson v. Heron Eng. Co.*, 198 Colo. 391, 394, 604 P.2d 674, 676 (1979); *Global Truck & Equip. Co. v. Palmer Mach. Works, Inc.*, 628 F.Supp. 641, 642 UCC Rep. 1250 (N.D. Miss. 1986). but see *Klein v. Sears Roebuck & Co.*, 773 F.2d 1421, 1424-25, 41 UCC Rep. 1233, 1237 (4th Cir. 1985) (the seller's post-sale representations created valid express warranty because purchase was conditioned on subsequent inspection of the goods by the seller); *Downie v. Abex Corp.*, 741 F.2d 1235, 1240-41, 39 UCC Rep. 427, 434-35 (10th Cir. 1984) (It was held that that a post-sale representation may be regarded as part of the basis of the bargain if it was relied on by the buyer).

⁸¹ 628 F. Supp. 641, 42 UCC Rep. 1250 (N.D. Miss. 1986).

⁸² The court in *Global Truck* case required mutual assent of the buyer and the seller because it considered a bargain under section 2-313 of the UCC as a contractual relationship between the parties. Under the court's view, in other words, a contract is valid only if each party is aware of its terms or modifications and agree to include those terms into the contract. See UCC, Sections 1-201 (3), 2-204(1).

⁸³ 628 F. Supp. at p. 652, 42 UCC Rep. at p. 1262.

⁸⁴ Murray, *supra.*, note 49, at p. 318.

in the sales literature."⁸⁶ In other words, the buyer's reasonable expectations about the product's quality and the truth of the seller's representations, justifies upholding un-relied-upon express warranties.

One may further argue that, as in the case with the pre-contract statement, the seller normally gains from his post-contract representation concerning the quality of the goods and as such he should not be allowed to escape liability for not delivering the goods in conformity with the representation simply by showing that the buyer did not know of the warranty.

In summary, in the light of Comments 3 and 7, the buyer under section 2-313's clause of the basis-of-the-bargain is not required to rely on, consider, or even know about the representations made by the seller in an agreement of sale. Clearly, this expansive definition of section 2-313's basis-of-the-bargain promotes the protections afforded to the buyer under Uniform Sales Act by relieving him of the burden of proving his reliance on the seller's statements. According to this definition, a court should enforce the seller's representations where it considers them as constituting an affirmation of fact rather than "merely [an affirmation] of the value of the goods or a statement purporting to be merely the seller's opinion."⁸⁷ Under this standard, in other words, the buyer needs merely to show that the seller made a representation concerning the quality of the goods sold. Once this is done, then the law, in the light of Comment 8 to section 2-313, presumes that: "all of the statements of the seller ... [are part of the basis of the bargain] unless good reason is shown to the contrary". In other words, courts consider the seller's representations to have created an express warranty unless the seller has proof that the buyer could not have understood the representations to be an express warranty. The seller can meet this burden by showing either that his representations amounted only to his opinions on the article value or that the buyer was aware that the representations were false or mistaken. This standard is supported by Comment 4 to section 2-313 which states that: "the whole purpose of the law of warranty is to determine what it is that the seller has in

⁸⁵ *Ibid.*, at pp. 321-323.

⁸⁶ *Ibid.*, at p. 322

⁸⁷ UCC, Section 2-313(2).

essence agreed to sell."⁸⁸ As Professor Murray has put it, "it is interesting that the comment emphasises the search for what 'the seller has in essence agreed to sell,' and not what the buyer has agreed to buy."⁸⁹ A court's inquiry should, therefore, focus on the seller's conduct, i.e., whether he made representations relating to the product's quality, and not on the physical product purchased by the buyer.

Negating of the seller's liability for breach of express warranties

Like the civilian concept of express warranty the expansive definition of section 2-313's basis-of-the-bargain clause proposed in the previous section does not require the buyer to rely on the representation concerning the product's quality made by the seller. This means that the latter is liable to deliver goods, which conform to his representations provided in the contract even if the buyer did not rely on these representations in purchasing the goods. In some instances, however, the seller may avoid this liability by rebutting the warranty's existence. In other words, despite the making of representations relating to the product's quality by the seller, under certain circumstances he may be held not to be liable for non-conformity of the goods with the representations. Under US law, courts generally allow two groups of factors to rebut the existence of an express warranty. Unlike the civilian tradition, the first group looks at the seller's representations directly to see whether they are affirmations of fact or simply opinions as to the product's value. The second group which is common between both the civilian systems and the UCC looks at the circumstances surrounding the bargain to determine whether the buyer knew that the seller's representations could not have warranted the goods.

Statements as expression of the opinions or "puffing"

⁸⁸ UCC, Section 2-313 comment 4.

⁸⁹ Murray, *supra.*, note 49, at p. 290.

Under section 2-313(2) of the UCC, the seller may negate his liability as to the product's quality by showing that the affirmations, descriptions, samples, or models provided in the contract were merely the expression of his own opinion about the goods rather than affirmations of facts concerning their quality and as such they did not become part of the basis of the bargain to create an express warranty under the UCC. According to section 2-313(2):

“an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.”

This section, in other words, allows the seller to escape liability for failing to deliver goods which conform to his own representations by arguing that the representations were merely the expression of his own opinion or commendation concerning the goods and, therefore, the buyer must not have reasonably construed them as an express warranty. This means that the buyer may sometimes be deprived of his basic right in demanding his counterpart to provide goods in conformity with the contractual representations which he has paid for even if he relied on the representations in purchasing the goods.

Furthermore, the wording of this section is ambiguous and has been the source of much litigation between the parties concerned since it does not provide any precise criteria as when the representations relating to the product are to be regarded as a mere affirmation of the value of the goods or opinion of the seller about them. Specificity, hedging, experimental goods, and buyer knowledge are the factors, which has been generally used by the courts to construe the seller's representations as an opinion rather than an affirmation of fact.⁹⁰

Specificity of the seller's representations is regarded as one of the elements in deciding whether an express warranty exists. It has been suggested that: “The more specific a quality statement, the more likely it becomes an express warranty”⁹¹ and that “Specific representations that goods are fit for a buyer's particular purpose usually create

⁹⁰ See generally, Andrew M. Baker et al, *op. Cit.*, *supra.*, note 50.

⁹¹ *Ibid.*, at p. 61.

express warranties of fitness for that purpose.”⁹² In other words, it is unlikely that the buyer may succeed in his warranty claim against the seller if the words used by the latter in describing the goods are general. However, it is not clear how specific a representation has to be in order to become an express warranty under the UCC.⁹³

Hedging refers to an equivocal statement relating to the quality of the goods made by the seller in a contract of sale. It is argued that in the case of hedging there is no express warranty to be enforced against the seller, that is, by providing an ambiguous statement in the contract the seller indicated that he was unwilling to commit himself fully to the product's quality. In *Perfetti v. McGhan Medical*,⁹⁴ for example, a mammary prosthesis manufacturer included a flyer in the product's packaging which read: “McGhan Medical Corporation is aware of the potential for leakage in inflatable implants over an undefined time period. Considering the chemical and physical properties of the material used in the manufacturer of the inflatable implants, deflation is not expected. However, long term result cannot be guaranteed by the manufacturer.”⁹⁵ The buyer rightly argued that the last line warranted the product's short-term lifespan by negative implication. The court, however, rejected this argument by stating that:

“Whatever the meaning of 'long term', the affirmation also negates less than a long-term result; it is affirmatively stated that leakage can occur over an undefined period of time.”⁹⁶

The decision in *Perfetti* indicates that a seller may safely lure a buyer into a bargain by adorning his quality representations in equivocal words and yet escape from any liability vis-à-vis the buyer for non-conformity of the goods with the representations. In other words, this decision demonstrates that, unlike French civil law, in the cases

⁹² *Ibid.*

⁹³ As a consequence, the courts have sometimes reached contradictory decisions with respect of the similar words used by the seller in different cases. In *McGregor v. Dimou*, 101 Misc. 2d 756, 422 N.Y.S.2d 806, 28 UCC Rep. 66 (N.Y. Civ. Ct. 1979), e.g., an advertisement by the seller that described the car in “Good condition” was held to create an express warranty, whereas, the court in *Bickett v. W.R. Grace & Co.*, 12 UCC Rep. 629 (W.D. Ky. 1972), decided that no warranty attaches to the seller's representation in the manual describing the corn seed as “very good standability, can stand high population under adequate fertility program, good blight tolerance, [and] high test weight.”

⁹⁴ 99 N.M. 645, 662 P.2d 646, 35 UCC Rep. 1472 (Ct. App.), *cert. denied*, 99 N.M. 644, 662 P.2d 645 (1983).

⁹⁵ *Ibid.*, at 651, 662 P.2d at 652, 35 UCC Rep. at 1476.

⁹⁶ *Ibid.*, at 652, 662 P.2d at 652, 35 UCC Rep. at 1477.

of doubt the buyer under section 2-313(2) of the UCC will most likely fail in his warranty claim against the seller.

Similarly, it has been decided that no express warranty attaches to representations relating to unproven or untested product under the UCC. To illustrate, *U.S. Fibres, Inc. v. Proctor & Schwartz, Inc.*,⁹⁷ a manufacturer entered into an agreement to produce resinated cotton pads through an “unproven process.”⁹⁸ Although the parties agreed on an “express warranty against defects in material and workmanship,” they also provided that “in view of the variables present effecting [sic] the capacity of the machine, no guarantee can be extended.”⁹⁹ The contract also contained a clause, which precisely described the machine. The court stated that because of the experimental nature of the machine no express warranty was created by the description.¹⁰⁰ The court's holding has been praised by some commentators as one which “promotes sound social policy.”¹⁰¹ They argue that: if “affirmations and descriptions of experimental machines generally created express warranties, manufacturers might hesitate to produce and market new products.”¹⁰² This argument, however, does not seem to be tenable since it is based on the policy of inducing a manufacturer to produce and market new products at the expense of an individual buyer.

The buyer's knowledge is another factor which may help a US court to distinguish between an affirmation of fact and a mere opinion. It has been stated that:

“The decisive test for whether a given representation is a warranty or merely an expression of the seller's opinion is whether the seller asserts a fact of which the buyer is ignorant or merely states an opinion or judgement on a matter of which the seller has no special knowledge and on which the buyer may be expected also to have an opinion and to exercise his judgement”¹⁰³

⁹⁷ 509 F.2d 1043, 16 UCC Rep. 1 (6th Cir.1975), *aff'g* 358 F. Supp. 449, 13 UCC Rep. 245 (E.D. Mich. 1972).

⁹⁸ *Ibid.*, at p. 1046, 16 UCC Rep. At p. 3.

⁹⁹ *Ibid.*, at p. 1045, 16 UCC Rep. At p. 2.

¹⁰⁰ *Ibid.*, at p. 1046, 16 UCC Rep. At pp. 3-4.

¹⁰¹ See “Andrew M. Baker *et al*, *op. cit.*, *supra.*, note 50, at p. 65.

¹⁰² *Ibid.*

¹⁰³ *Keller v. Flynn*, 346 Ill App. 499, 105 N.E.2d 532 (1952); *Royal Business Mach., Inc., v. Lorraine Corp.*, 633 F.2d 34, 41, 30 UCC Rep. 462, 467 (7th Cir. 1980); *Peterson v. North Am. Plant Breeders*, 218 Neb. 258, 262-263, 353 N.W.2d 625, 630 39 UCC Rep.1637, 1642 (1984).

This test, however, is not particularly helpful in making the distinction between fact and opinion, since it does not focus on the representations actually made by the seller. Instead, it looks to the knowledge of the parties and states that any representation made to an ignorant buyer create express warranty simply because the buyer is ignorant. Conversely, the test permits a seller with little knowledge to make specific representations relating to the goods without being liable for creating of an express warranty. The test fails because it does not objectively consider whether a reasonable buyer could understand the representations to create an express warranty on their face. It might be argued that the buyer's knowledge might preclude a warranty from attaching to a clear affirmation of fact. This argument, however, does not necessarily lead to the conclusion that all statements made to an ignorant buyer create express warranties and all statements made by an ignorant seller do not give rise to an express warranty.

In the fairly recent Californian case of *Keith v Buchanan*,¹⁰⁴ the court of appeal tried to ease the buyer's efforts to demonstrate that the seller's representations amounted to an express warranty rather than a mere opinion:

"Recent decisions have evidenced a trend toward narrowing the scope of representations which are considered opinion,... resulting in an expansion of liability that flows from broad statements of manufacturers or retailers as to the quality of their products.... It has been even suggested that in the age of consumerism all seller's statements, except the most blatant sales pitch, may give rise to an express warranty."¹⁰⁵

The court adopted Comment 8 to Section 2-313 as the standard to distinguish between fact and opinion, holding that:

"[s]tatements made by a seller during the course of negotiation over a contract are presumptively affirmations of fact unless it can be demonstrated that the buyer could only have reasonably considered the statement as a statement of the seller opinion."¹⁰⁶

¹⁰⁴ 173 Cal. App. 3d 13, 220 Cal. Rptr. 392, 42 UCC Rep. 386 (1985), at p. 390 (citing R. M. Alderman & R. F. Dole, A *Transactional Guide to the Uniform Commercial Code* (2nd. ed. 1983) vol. 1, 89).

¹⁰⁵ *Ibid.*, at p.21, 220 Cal. Rptr. at p. 396, 42 UCC Rep. at p. 390 (citing E. Alderman & B. Dole, A *Transactional guide to the Uniform Commercial Code* (2nd. ed. 1983) vol. 1, 89).

¹⁰⁶ *Ibid.*, at 21, 220 Cal. Rptr. At 396, 42 UCC Rep. At 391.

It may be argued, however, that in the commercial relationships between the parties it is hard to imagine that statements made by the seller are merely the reflection of his own opinions as to the product's value and that they have no influence whatsoever over the buyer in the course of dealing with the former. Surely, the seller would not make any statement as to the quality of the goods if it were not beneficial to him. Accordingly, it is unjust to allow the seller who benefits from such a statement to escape from the liability if the goods are not in accordance with the statement.

The buyer's knowledge that the statements concerning the goods' quality were untrue

The seller's liability as to the quality of the goods may also be avoided if he can prove that the buyer knew that the representations were untrue. Since the buyer's knowledge of the defects in the goods will naturally preclude him from understanding that an express warranty was created by the seller's representations. An examination of the buyer's knowledge requires a court to focus on the circumstances surrounding the bargain, rather the representations made by the seller. In other words, unlike the objective standard applicable to the seller's opinions, the inquiry as to the buyer's knowledge requires a subjective standard, since in the latter case the court must examine the knowledge possessed by the individual buyer in question.

The seller can show that the buyer had knowledge about the falsity of the seller's representations with regard to the goods' quality before entering the bargain¹⁰⁷ or that the buyer acquired such knowledge during the course of the parties' commercial relationship.¹⁰⁸ To illustrate, in *Price Brothers Co. v. Philadelphia Gear Corp.*,¹⁰⁹ the seller erroneously represented that the components ordered by the buyer would meet

¹⁰⁷ See, e.g., *Carson v. Chevron Chem. Co.*, 6 Kan. App.2d 776, 786, 635 P.2d 1248, 1256, 32 UCC Rep. 834, 844-845 (1981) (farmer's knowledge about pesticide prevented seller's affirmation from becoming part of the basis of the bargain); *Scainae v. Holstein*, 103 A.D.2d 880, 880, 477 N.Y.S.2d 903, 904, 38 UCC Rep. 1595, 1595 (N.Y. App. Div. 1984) (buyer's knowledge of car's transmission defect prevented newspaper advertisement stating excellent condition from creating warranty).

¹⁰⁸ See *Royal Business Mach., Inc. v. Lorraine Corp.*, 633 F.2d 34, 43-44, 30 UCC Rep. 462, 471-472 (1980)

¹⁰⁹ 649 F.2d 416, 31 UCC Rep. 469 (6th Cir. 1981).

the specifications listed in the buyer's purchase order. It was found that the seller's erroneous assurances that the components would conform to the purchase order's specifications did not create an express warranty for 'Price Brothers' experts should have recognised this error as either 'puffing' or falsehood."¹¹⁰ The court's use of the phrase "should have recognised" should not be confused with an objective standard for examining buyer knowledge. The court discussed the buyer's representative's personal familiarity with the product at issue: "The expertise of *Price Brothers'* representatives, and their familiarity with the requirements of *Price Brothers'* pipe wrapping machine enabled them to make an independent assessment of the adequacy of the proposed components for the tasks assigned to them."¹¹¹ The court used the phrase "should have known" not to invoke a reasonable man standard, but to hold these buyers' to a standard commensurate with their established knowledge of the product. The court looked only at the knowledge of the buyer in question. The buyer's knowledge of untruthfulness of the representations made by the seller can also be established by showing that the former inspected the goods and discovered the patent defects in them before entering into the contract with the seller.¹¹² In the case of *Keith v. Buchanan*,¹¹³ the court held that although the buyer had experts inspect a boat, the warranty of seaworthiness was not waived because no water testing took place.¹¹⁴ "[A]n examination or inspection by the buyer of the goods does not necessarily discharge the seller from an express warranty if the defect was not actually discovered and waived."¹¹⁵ Because the inspection was limited, the buyer could not have discovered the boat's unseaworthiness. The decision has correctly resolved the pre-UCC question of whether or not a seller should be liable for his statements about the quality of the goods if the buyer fails to carry out the offer to inspect the goods before conclusion of the deal between the parties. The law should

¹¹⁰ *Ibid.*, at 423, 31 UCC Rep. at 474-475.

¹¹¹ *Ibid.*, 31 UCC Rep. At 475.

¹¹² See *Jensen v Seigel Mobile Homes Group*, 105 Idaho 189, 194-195, 668 P.2d 65, 70-71, 35 UCC Rep. 804, 813-818 (1983).

¹¹³ 173 Cal. App. ad at 24, 220 Cal. Rptr. at 398, 42 UCC Rep. at 393-394.

¹¹⁴ *Ibid.*, 220 Cal. Rptr. at 398, 42 UCC Rep. at 393.

¹¹⁵ *Ibid.*, 220 Cal. Rptr. at 398, 42 UCC Rep. at 393.

not require the buyer to examine the goods where there is an express warranty in the contract.

Similarly, it could be argued that, unlike Anglo-US law, in the case of the existence of an express warranty, the buyer should not be charged for failing to detect the defects which are covered by the seller's representations where he inspects the goods even if the defects are normally discoverable by such inspection. Since, in such instances, the buyer has no duty to inspect for the detection of defects covered by an express warranty and he will normally examine the goods to discover of those particulars which are not covered by the provisions of the contract.

Like the civilian tradition,¹¹⁶ the good faith standard of section 1-203 prevents the buyer "from remaining silent in the face of known overstatements of performance by [the seller] and then asserting that those falsehoods were a basis of the bargain."¹¹⁷ The buyer who knows that the representations made by the seller are mistaken has a duty to inform the seller of his over statements. Under these circumstances, the sellers' representations are not reasonably understood to become part of the basis of the bargain as required by section 2-313 to create an express warranty. Similarly, the seller's representations do not become part of the basis of the bargain if the seller can show that he withdrew them before completing the deal with the buyer. As an example, in the case of *McGhee v. GMC Truck & Coach Division*¹¹⁸ it was noticed that the seller's representations concerning the quality of the truck sold by the contract of sale were explicitly withdrawn by him from the contract. The court argued that the parties "so structured the terms of the sale as to lay the risk of hidden mechanical defects on the plaintiff, who admittedly understood this to be the case."¹¹⁹ Therefore, the said court rejected the buyer's assertion that the seller's statements describing the truck as being in a good condition created an express warranty.

¹¹⁶ Unlike the common law, however, the transaction under the civil law principle of good faith may be void *ab initio* if either of the parties fails to observe the principle of goods faith in their agreement.

¹¹⁷ See *Price Brothers Co. v Philadelphia Gear Corp.*, 31 UCC Rep. (6th Cir. 1981) at 475.

¹¹⁸ (8 Mich. App. 495, 296 N.W.2d 286, 30 UCC Rep. 121 (1980). It was partly in the contract that: "[T]here are no express warranties and no representations, promises or statements have been made by said seller in respect of said property unless endorsed hereon or incorporated herein by reference hereon ..." *Ibid.*, at 499-500, 296 N.W. 2d at 289, 30 UCC Rep. at 124.

¹¹⁹ *Ibid.*, at 504, 296 N.W.2d at 291, 30 UCC Rep. at 125.

In short, the basis-of-the-bargain standard under section 2-313 has eliminated the pre-UCC requirement of reliance by the buyer on the seller's representations regarding the product's quality in establishing an express warranty in the contract of sale. Like the civilian tradition, under the new system any statement about the condition of the goods by the seller is presumed to have created an express warranty even if it is made after the conclusion of the contract. In other words, unlike English law, a post-sale statement by the seller will automatically become part of the basis of the bargain between the parties and it could be enforced against him without being relied on or supported by a new consideration by the buyer. On this basis, the buyer need only show that the seller made statements relating to the goods. Under certain circumstances, however, the law allows the seller to refute his statements create an express warranty under section 2-313 of the UCC. Accordingly, the seller can escape liability by proving that the buyer knew, or, unlike Iranian law, he should have known of the untruthfulness of the seller's representations. Similarly, unlike the civilian tradition, the seller may discharge his liability concerning his representations by arguing that the representations were merely the reflection of his own opinion as to the product's value and, as such, they did not constitute an express warranty.

Implied warranties under the Uniform Commercial Code (UCC)

There are two implied warranties in the UCC: the implied warranty of merchantability¹²⁰ and the implied warranty of fitness for particular purpose.¹²¹ Each is wholly distinct from each other. The implied warranty of merchantability applies to goods used for their ordinary purpose, whereas the implied warranty of fitness for particular purpose applies when the buyer uses goods for purposes to which they are not ordinarily put.¹²²

Like the civilian warranty against latent defects, the seller's liability as to the merchantability of the goods and their fitness for a particular purpose, under both the

¹²⁰ UCC, Section 2-314.

¹²¹ UCC, Section 2-315.

US and the English systems, is regarded as being imposed by the law and therefore, they do not arise from the agreement of the parties.¹²³ Commentators have mentioned several reasons for imposing the implied warranties on the sale of goods. These reasons include:

“(a) Public policy which requires that the party which puts goods into the stream of commerce should bear the risk of harm caused by defective goods, rather than the person injured by it; (b) the fact that the one party has induced the reliance of the consumer on his skill and knowledge; (c) the fact that the former is in a better position to control the antecedents which affect the quality of the product; and (d) the fact that he is better able to distribute the loss.”¹²⁴

Among these rationales, the fact that the buyer ought to be able reasonably to rely on the knowledgeable seller is perhaps the most important one which has also been adopted, either expressly or by implication, by the drafters of both implied warranty of fitness for a particular purpose, under section 2-315, and the implied warranty of merchantability, under section 2-314.¹²⁵ Such a policy is analogous to common law tort principles imposing liability on the person possessing knowledge of a hazard because he has a greater chance to protect against its dangers.¹²⁶ Implied warranties in this context are much closer to tort law than to contract law, while, in fact, these warranties arise from the parties' agreement.

This policy has led the courts to conclude that in the absence of fraud or an express warranty the rule of *caveat emptor* applies to all contracts of sale of personal property where the buyer has an opportunity for examination or inspection of the

¹²² UCC, Section 2-315, Comment 2.

¹²³ See *MacAndrews & Forbes Co. v Mechanical Mfg. Co.*, 367 Ill. 288, 11 N.E.2d 382 (1937). It is stated that an implied warranty under the common law " 'is a curious hybrid, born of the illicit intercourse of tort and contract'-a contractual term promising quality but imposed by law rather than by agreement." See Andrew M. Baker et al, *supra.*, note 50, at p. 68.

¹²⁴ See Note, "The Extension of Warranty Protection to Lease Transactions" (1968) 10 *Boston College Industrial & Commercial Law Review* 127, at pp. 140-141.

¹²⁵ Although section 2-314 of the UCC does not expressly require the buyer to prove his reliance on the seller's knowledge in his warranty claim of merchantability, it expressly states that the latter is liable for such a warranty only if he is a merchant "with respect to goods of that kind" involved in the transaction between the parties. See Andrew M. Baker et al, "Article Two Warranties in Commercial Transactions: An Update" (1987) 72 *Cornel Law Review* 1159, 1191. This construction of section 2-314 has also been approved by the case law. See further, *Wingo v. Norfolk & W. Ry.*, 1 UCC Rep. 2d 389, 391 (W.D. Va. 1986); *Goodbar v. Whitehead Bros.*, 591 F.Supp.552, 567, 39 UCC Rep. 450, 455 (W.D. Va.1984).

¹²⁶ See generally, Henderson J. A. & Richard N. P., *The Torts Process* (2nd ed., Boston : Little,

property purchased,¹²⁷ even though no test or inspection is actually made,¹²⁸ presumably because in such instances the buyer cannot prove that he has relied on the seller's knowledge. This means that the buyer would be unjustifiably deprived of any remedy as against the seller even if it transpires later that the goods were worthless at the time of purchase simply because he failed to examine the goods or in the case of their examination he failed to detect the defects upon examination. Clearly, this policy would tip the balance in favour a seller who also, in most instances, enjoys of a superior bargaining power in dealing with a buyer. Under this policy, a seller would prefer to conceal the defects in his products with the expectation that the buyer would fail to discover them. One may justify the courts' decision by arguing that it was the buyer's failure which caused the damage, and therefore, he is the one who should bear the consequences of his failure. This argument, however, does not seem to be tenable since a good faith seller would not reasonably expect to be paid for something which is worthless as it is unreasonable to expect the buyer to pay for it. In other words, by making a sale the seller impliedly undertakes to deliver goods, which are free from latent defects. Accordingly, unless otherwise expressly agreed by the parties the law should hold the seller liable vis-à-vis the buyer if it transpires that the goods sold are defective even though the latter has failed to discover the defects by an inspection or a test on the goods. It might be said that the parties have impliedly agreed to exclude the implied warranties by providing an opportunity to the buyer to examine the goods before their purchase. However, there is no justification why the law should require the buyer to test the goods where there is an agreement that the goods purchased must not be defective. In other words, in the absence of an express agreement to the contrary, the buyer has no duty to examine the goods before conclusion of the sale. For the same reason, even if such an examination is taken place the buyer should not be charged for failing to detect the defects by arguing that he should have reasonably discovered these defects by the

Brown, 1981) at pp. 508-09.

¹²⁷ *Bansbach v. Allied Mach. & Welding Co.*, 334 Ill. App. 76, 78 N.E.2d 344 (1948).

¹²⁸ *Grass v Steinberg*, 331 Ill. App. 378, 73 N.E.2d 331 (1947).

examination. Of course, the buyer in good faith is bound to reveal to the seller any defect, which has been detected by the examination.

Implied warranty of merchantability

Scope of application

The implied warranty of merchantability as the most important warranty under US law¹²⁹ has been codified by section 2-314 of the UCC, which in part reads:

“Unless excluded or modified (section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.”

As can be seen, in contrast with the UK Sale of Goods Act 1979 (as amended)¹³⁰ the section has broadened the scope of the warranty by omitting the pre-UCC qualification that the sale be by “description”.¹³¹ This omission has relieved the courts of the difficult problem of defining what is a sale by description.¹³² Another omission is the clause pertaining to whether the seller be manufacturer or grower or not. The absence of these words does not restrict the applicability of the section to only those two classifications.¹³³

Despite these changes, however, the drafters of the UCC failed to extend the protection afforded by the implied warranty of merchantability to cover all purchasers of goods. Only those purchasers who deal with a “merchant with respect to goods of that kind” may afford such protection. Others have been given no relief as against their seller’s even if it is established that their products were worthless

¹²⁹ J. White & R. Summers, *Uniform Commercial Code, op. cit. supra.*, Part 1, Ch. 2, note 110, § 9-7, at 510

¹³⁰ See, Sale of Goods Act 1979, Section (2A).

¹³¹ See Uniform Sales Act, Section 15(2).

¹³² The terminology, “bought by description, has never been clearly defined by the US courts. In fact, it has been admitted that the term is somewhat indefinite. See *Bonenberger et al. v. Pittsburgh Mercantile Co.*, 345 Pa. 559, 28 A.2d 913 (1942).

¹³³ UCC, Section 2-314, Comment 2. Prior to the Uniform Sales Act, the majority of the jurisdictions held that the implied warranty of merchantability was not applicable where the seller was merely a

when they were sold. Surely, this policy contradicts with the drafters' intention in designating of the implied warranty of merchantability "to protect the buyer of goods from bearing the burden of loss where merchandise...does not conform standards."¹³⁴ One of the consequences of this policy is an increase of the litigation between the parties concerned. The courts must confront the difficult problem of determining whether a particular seller is a merchant under section 2-314. This would, in turn, diminish the mutual trust between the parties in this field of law and would cause to slow down free flow of products in a society.

Definition of merchantability

The buyer may not recover damages unless, amongst others, he can show that the goods were not merchantable at the time of the sale.¹³⁵ Like the Sale of Goods Act 1979 (as amended),¹³⁶ section 2-314(2) of the UCC sets out certain guide posts as an aid in determining whether the goods are merchantable.

"Goods to be merchantable must at least be such as
(a) pass without objection in the trader the contract description; and
(b) are fair average quality in the trade and within the description; and
(c) are fit for the purpose for which such goods are used; and
(d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
(e) are adequately contained, packaged, and labelled as the agreement may require; and
(f) conform to the promises or affirmations of fact made on the containers or label if any."

These UCC specifications are not intended to exhaust the meaning of merchantable or to lessen the effect of any of its characteristics, which are not specially mentioned. The words "must at least such as" were used with the intention to leave open other

dealer. See, e.g., *Sellers v. Stevenson*, 163 Pa. 262, 29AT1. 715 (1894).

¹³⁴ W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on the Law of Torts* (5th ed. 1984) § 97, 651

¹³⁵ The buyer is, further required to prove that: (1) a breach of the warranty proximately caused damages to the plaintiff or his property; and (2) notice was given to the seller of injury or damages.

¹³⁶ See, Sale of Goods Act 1979, Sections 14(2A) and 14(2B).

possible attributes of merchantability.¹³⁷ Nevertheless, the courts are unwilling to impose additional standards, instead they prefer to expand those listed in section 2-314(2) to cover unforeseen attributes.¹³⁸

The courts use an objective standard in deciding whether the article sold conforms to section 2-314(2)'s standards.¹³⁹ In other words, reasonableness, not perfection, lies at the heart of the merchantability within the context of section 2-314(2). For example, in *Sessa v. riegle*,¹⁴⁰ the plaintiff purchased a race horse named Tarport Conaway from a merchant for \$25,000. The plaintiff soon discovered tendinitis in the horse's front legs. This disease soon vanished, only to be replaced by lameness in the hind legs. After treatment and rest, the undaunted animal won three of the thirteen races it entered, earning \$1,306, which was a disappointing return on the plaintiff's investment of \$25,000. The court held that the alleged defects at the time of the sale do not render the horse unmerchantable:

"The standard established does not require that goods be outstanding or superior. It is only necessary that they be of reasonable quality within expected variations and fit for the ordinary purposes for which they are used

Even with tendinitis and intermittent claudication Tarport Conaway met this standard. The tendinitis was merely temporary and of no long term effect. The intermittent claudication did not prevent him from becoming a creditable if unspectacular race horse. After rest and recuperation, he won three races in thirteen starts in 1975. Certainly he did not live up to Sessa's hopes for preferred pacer, but such disappointments are an age old story in the horse racing business. Anyone who dares to deal in standardbreds knows that whether you pay \$25,00.00 or \$250,000.00, a given horse may prove to be a second Hambletonian or a humble hayburner. Consequently, since Tarport Conaway was able to hold his own with other standardbreds, he was reasonably fit for the ordinary purpose for which race horses are used, and was merchantable."¹⁴¹

As can be seen, unlike the civilian tradition of warranty against latent defects,¹⁴² the existence of a latent defect in the goods at the time of the sale does not necessarily render the seller liable for breach of section 2-314(2) of the UCC.

¹³⁷ UCC, section 2-314, Comment 6.

¹³⁸ Andrew M. Baker *et al*, *op. cit. supra*, note 125, p. 1207.

¹³⁹ *Ibid.*, at pp. 1207-1213.

¹⁴⁰ 427 F. Supp.760, 21 UCC Rep. 745 (E.D. Pa. 1977), *aff'd mem.*, 568 F.2d 770 (3d Cir. 1978).

¹⁴¹ *Ibid.* at pp. 769-770, 21 UCC Rep. At pp 758-759.

¹⁴² As to the position under French Law, for example, See pp. 259-262, post.

Pass without objection in the trade

Under the section 2-314(2)(a) of the UCC, the goods are not merchantable unless they “pass without objection in the trade under the contract description.” In other words, the goods delivered by the merchant-seller must be of quality to meet whatever standard or custom prevails in the trade for goods of that kind. Accordingly, the court in *Ambassador Steel Co. v. Ewald Steel Co.*,¹⁴³ held that, to be merchantable, steel must have a carbon content of 1010 to 1020, since such was the custom and usage of the trade. It was stated by the court that:

“[P]laintiff breached the implied warranty of merchantability in selling to defendant steel of a different quality than ordinarily sold in the custom and usage of the steel business, and not fit for the ordinary purposes for which such goods are used.”¹⁴⁴

In commercial transactions, the courts often link the ordinary purpose of the goods to the expectations in the trade. As an example, in *Latimer v. William Muller & Son, Inc.*,¹⁴⁵ the trial court found that seeds that had a general reputation in the trade for being disease-free did not meet the standard of passing without objection if they were highly contaminated with bacteria.

Concerning consumer goods, the courts have interpreted the above standard to encompass public expectations. Accordingly, in *Thomas v. Ruddell Lease-sales, Inc.*,¹⁴⁶ the court noticed that a used Corvette delivered to the buyer had been wrecked and repaired prior to the agreement of sale. It was decided that the Corvette failed to “pass without objection in the trade” since the public generally rejects wrecked, although subsequently repaired, Corvettes.

It is to be remembered that although section 14(2B) concerning the standards of satisfactoriness of the goods under the UK Sale of Goods Act 1979 (as amended) contains no provision equivalent to the standard in section 2-314(2)(a) nonetheless,

¹⁴³ 33 Mich. App. 495, 190 N.W.2d 275, 9 UCC Rep. 1019 (1971).

¹⁴⁴ *Ibid.*, at p. 502, 190 N.W.2d at p. 279, 9 UCC Rep. at p. 1023.

¹⁴⁵ 149 Mich. App. 620, 632-634, 386 N.W.2d 618, 623-624, 1 UCC Rep. 2d 1128, 1134-1135 (1986).

¹⁴⁶ 43 Wash. App. 208, 716 P.2d 911, 1 UCC Rep. 2d 394 (1986).

similar provisions to that of section 2-314(2)(a) have been provided by section 14(4) of the Act. Accordingly, as Professor Atiyah observes:¹⁴⁷

“Where the transaction is connected with a particular trade, custom and usage of that trade must be considered as part of the background against which the parties contracted.”

Fair average quality (fungible goods)

According to section 2-314(2)(b), fungible goods must be of “fair average quality” within the contract description. Comment 7 to this section states:

“‘Fair average’... means goods centring around the middle belt of quality, not the least or the worst that can be understood in the particular trade by the designation, but such as can pass ‘without objection.’ Of course a fair percentage of the least is permissible but the goods are not ‘fair average’ if they are all of the least or worst quality possible under the description.”

The price at which the goods are sold could be served as an excellent index of the quality intended.

The courts often use this section in connection with section 2-314(2)(a) as it is recommended by Comment 7 to section 2-314. This is because both of them refer “to the standards of that line of the trade which fits the transaction and the seller’s business.”¹⁴⁸

It is to be noted that, unfortunately, there is no provision equivalent to section 2-314(2)(b) under the UK Sale of Goods Act 1979 and accordingly, the seller bears no liability against the buyer even if the quality of the goods delivered is the least or worst quality possible under the description.¹⁴⁹

Fit for ordinary purposes

¹⁴⁷ See P. S. Atiyah, *The Sale of Goods, op. cit., supra.*, Part 1, Ch. 1, note 73, at p. 180 and the cases cited there.

¹⁴⁸ UCC, Section 2-314, Comment 7.

¹⁴⁹ See *Kendall v. Lillico* [1969] 2 AC 31, 79-80 per Lord Reid. See further, pp. 203-204, ante.

As to section 2-314(2)(c), fitness for ordinary purpose is a fundamental concept of merchantability.¹⁵⁰ This provision has settled the pre-UCC troubling question of whether merchantability means only saleable or did it includes use and consumption. Merchantable is no longer synonymous with saleable. Under the provisions of this section, the goods must be reasonably fit for their usual, intended purpose. The seller is considered to be in breach of this standard, unless the goods are reasonably safe for their ordinary use¹⁵¹ and are reasonably capable of performing their ordinary functions.¹⁵²

According to Comment 8 to section 2-314, the fitness for ordinary purpose requirement equally applies to both goods sold for resale and those sold to the customer.¹⁵³

An article's ordinary purpose is one which could reasonably be foreseen by the seller. In other words, the buyer would have no relief against the seller for breach of the implied warranty if he uses the article in a manner, which is unforeseeable to the latter. On this basis, it was decided that a dump-truck that overturned when used to haul clay was not used for an ordinary purpose since the manufacturer could not reasonably foresee that the truck would be used for other than its intended purpose of hauling wash rock.¹⁵⁴ Moreover, the buyer cannot sue the seller for harm caused by deliberate misuse of the goods totally unrelated to any normal or intended use.¹⁵⁵

¹⁵⁰ See R. Nordstrom, *Handbook of the Law of Sales* (1970). According to Professor Nordstrom, fitness for ordinary purposes "is the key thought - the heart - of the merchantability warranty." *Ibid.*, at p. 235.

¹⁵¹ As an example, in the case of *Tateka v. Ford Motor Co.*, 86 Wis.2d 140, 271 N.W.2d 653, 25 UCC Rep. 680 (1978), a car with a single defect which caused a substantial safety hazard was held unmerchantable since it failed to meet the standard provided by section (2)(C). See further, *Maybank*, 46 N.C. App. at 692, 266 S.E.2d at 412, 29 UCC Rep. at 73.

¹⁵² In *Perry v. Lawson Ford Tractor Co.*, 613 P.2d 458, 29 UCC Rep. 75 (Okla. 1980), for example, the court found that frequent breakdown of combine rendered it unfit for the ordinary purpose and, therefore, the seller was held to be in breach of implied warranty.

¹⁵³ For the full text of Comment 8 to section 2-314, see Appendix I.

¹⁵⁴ *Global Truck & Equip. Co. v. Palmer Mach. Works, Inc.*, 628 F. Supp. 641, 649-50, 42 UCC Rep. 1250, 1259 (N.D. Miss. 1986).

¹⁵⁵ In *Venezia v. Miller Brewing Co.*, 626 F.2d 188, 29 UCC Rep. 487 (1st Cir. 1980), thus, it was held that the manufacturer-seller did not need to design beer bottle to withstand deliberate misuse by throwing bottle against telephone pole.

There has been a dispute over the issue of whether the implied warranty of merchantability applies to used or second hand goods, since the UCC provides no express provision to this effect. In the case of *Chaq Oil Company v. Gardener Machinery Corporation*,¹⁵⁶ the buyer of a “Crawler-tractor” sued the seller for damages caused by the alleged breach of the implied warranty of merchantability. The Texas Court of Civil Appeals dismissed the case, arguing that implied warranty of merchantability is not applicable in the case of goods purchased with the knowledge that they are used goods. However, like English law, the majority of the jurisdictions do not agree with this decision.¹⁵⁷ In *Overland Bond & Investment Corporation v. Howard*,¹⁵⁸ for example, the Illinois Court of Appeal, by referring to section 2-314(1), rightly stated that the implied warranty of merchantability depends not on whether the goods were new or used but on whether “... the seller is a merchant with respect to goods of that kind.”¹⁵⁹ After making the position clear that the section 2-314 makes no specific distinction between new or used articles, the sale of which give rise to implied warranties, the court went on to make the distinction that the merchantability warranty in the second-hand sale is not identical with the merchantability warranty in the new car sale.¹⁶⁰ In this regard, the court made specific reference to Comment 3 to section 2-314 which, in part, states that:

“[a] contract for the sale of second-hand goods, however, involves only such obligation as appropriate to such goods for that is their contract description.” To qualify as merchantable, the court referring to section 2-314, said “the goods must be at least such as ... are fit for the ordinary purpose for which such goods are used.”¹⁶¹

Adequately contained, packaged, and labelled

¹⁵⁶ 500 S.W.2d 877 (Tex. Civ. App. 1973).

¹⁵⁷ See, e.g., *Smith Sharpenstein*, 44 Okla. Bar Assen. J. 3568, 13 UCC Rep. 609 (Okla. Ct. of App. 1973); *Williams v. College Dodge, Inc.*, 11 UCC Rep. 958 (Mich. D.C. 1972); *Georgia Timberlands, Inc. v. Southern Airway Co.*, 125 Ga. App. 404, 188 S.E.2d 108, 10 UCC Rep. 789 (Ga. Ct. App. 1972); *Baker v. City of Seattle*, 484 P.2d 405, 9 UCC Rep. 226 (Wash. Sup. Ct. 1971).

¹⁵⁸ 9 Ill. App.3d 348, 292 N.E.2d 168, 11 UCC Rep. 945 (Ill. App. Ct. (1972).

¹⁵⁹ *Ibid.* at p. 949.

¹⁶⁰ *Ibid.*, at p. 950; See also, Comment, (1971) 42 *Colorado Law Review* 473.

According to section 2-314(2)(e), the goods must be “adequately contained, packaged, and labelled as the agreement may require.” In other words, like the UK Sale of Goods Act 1979 (as amended), the implied warranty of merchantability under the UCC covers both the quality of the goods and their packages.

Generally, the purpose of adequate packaging is to protect the goods as well as the people using the goods from harm. Accordingly, inadequately packaged goods may render the seller liable for breach his implied warranty of merchantability. As an example, the court in *Pugh v. J.C. Whitney & Co.*,¹⁶² held that the seller, who shipped automobile parts that had sharp projections in a box without any covering on the projections or warning about them, breached section 2-314(2)(e) of the UCC. According to the court the seller at the time of the sale had impliedly undertaken:

“that the package was reasonably safe to open and that the receiver of the package could safely introduced his hand into the package and extract the merchandise and that the potentially dangerous parts of the product were covered and protected.”¹⁶³

Similarly, the seller’s failure to label the goods adequately “as the agreement may require”¹⁶⁴ may render them unmerchantable. In *Agricultural Servis Association v. Ferry-Morse Seed Co.*,¹⁶⁵ for example, the court held that mislabelled okra seed delivered by the seller was unmerchantable. To find out whether the goods are adequately labelled, one has to pay due consideration to the particular circumstances of the transaction between the parties. In *Carnes Constraction Co. v. Richards & Supply Co.*,¹⁶⁶ for example, a buyer ordered bathrooms hardware of a particular brand. The goods delivered in large cartons marked with the correct brand name, but the cartons contained individual packages marked with another brand name. Apart from packages the goods appeared unidentifiable. The buyer notified the seller of the problem and rejected the goods before receiving an assurance from the seller that

¹⁶¹ *Ibid.*

¹⁶² 9 UCC Rep. 229 (E.D.N.Y. 1971).

¹⁶³ *Ibid.*, at p. 231.

¹⁶⁴ UCC, Section 2-314(2)(e) (emphasis added).

¹⁶⁵ 551 F.2d 1057, 1065, 21 UCC Rep. 443, 452 (6th Cir 1977).

¹⁶⁶ 10 UCC Rep. 797 (Okla. Ct. App. 1972).

they were the correct brand. The seller contended that he did not encroach section 2-314(2)(e) by arguing that the correct label were on the large shipping cartons, that no labelling requirement appeared in the buyer's order, and that even without labels the fixtures could be identified by persons in the trade. On the other hand, the buyer insisted "that the brand of bathroom fixtures cannot be identified by characteristics and customarily are put in labelled individual cartons."¹⁶⁷ The court found that reasonable inferences could be drawn from the circumstances of the case in support of the either party's contentions, and, accordingly, decided to maintain the jury's verdict in favour of the seller.¹⁶⁸

It appears that the protection afforded to a buyer under the UCC's implied warranty of merchantability is far less than the one given by the seller's warranty against latent defects under the civilian systems. As an example, while the warranty against latent defects impliedly arises from the parties' agreement and, therefore, applies to every sale of goods contract, the UCC's implied warranty of merchantability is imposed only on the seller who is a merchant "with respect to the goods of that kind".¹⁶⁹ Moreover, there might be instances in which the goods are defective but not unmerchantable or unsatisfactory within the context of Anglo-US law in so far as the defects do not affect the ordinary utility of the goods. Accordingly, the defects which substantially reduced the price of the goods rather than their usual utility are covered by the civilian implied warranty against latent defect,¹⁷⁰ whereas, the buyer has no this defect under Anglo-US law.

Finally, unlike the UCC, the principle of good faith applicable to the formation of contract under the civilian systems binds the seller to reveal any defects in the goods to the buyer at the time of the contract. This provision is very important, particularly where the seller of the goods is a professional person, since, in such instances, he is deemed to know all the latent defect in the goods sold with the consequence that he will be liable for any damages caused by the defects even if such

¹⁶⁷ *Ibid.*, at p. 801.

¹⁶⁸ *Ibid.*, at p. 802.

¹⁶⁹ UCC, Section 2-314 (1).

¹⁷⁰ As to the provisions of the French law in this respect, see pp. 258-261, post.

damages were not predictable to the parties at the time of the contract.¹⁷¹ This protection is available to the buyer even if he has an opportunity to inspect the goods but either he did not carry out the inspection, or he failed to detect the defects even though such an inspection reasonably lead the buyer to detect the defects. This is because the seller is considered to have acted fraudulently in concealing of the defects whilst the buyer's failure amounts to negligence, with the consequence that the law would prevail the negligence buyer to the fraudulent seller.¹⁷²

Implied warranty of fitness for particular purpose

The other principal implied warranty under the UCC is that of fitness for a particular purpose. According to section 2-315 of this UCC:

“Where the seller at the time of the contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgement to select or furnish suitable goods, there is unless excluded or modified under next section an implied warranty that the goods shall be fit for such purpose.”

As can be seen, there are three statutory prerequisites to the creation of this warranty. First, the seller must have knowledge, or reason to know, of the particular purpose for which the goods are bought. Second, he must also have knowledge or reason to know that his buyer is relying on his skill or judgement to furnish appropriate goods. Finally, the buyer must actually rely on the seller's skill or judgement in selecting or furnishing the article. As to the first requirement, the warranty arises when the seller has reason to know, as contrasted with the weaker language of the Sale of Goods Act 1979 “buyer... makes known.”¹⁷³ In other words, in contrast with the UK Act 1979, the UCC, does not require the buyer's actual communication of his particular purpose and reliance to the seller. It is sufficient if the circumstances are such that the seller

¹⁷¹ As to the position under French law, see pp. 101, 268, 271.

¹⁷² A German court followed this argument in one case which was governed by the CISG. See *United Nations General Assembly*, A/CN.9/SER.C/ABSTRACTS/12 (26 May 1997), Case 168 pp. 5-6, the fact of which is given at p. 312, post

¹⁷³ Sale of Goods Act 1979, Section 14(3).

has reason to realise the intended purpose and the reliance.¹⁷⁴ Nonetheless, the courts in the UK interpret this requirement under section 14(3) of the Act 1979 literally and, therefore, in practice, if the seller was aware of the buyer's particular purpose or he would have inferred it from the circumstances of the contract, this will be taken as an implied communication of the purpose by the buyer.¹⁷⁵

Onus of burden

The main difference between these two systems is that, under section 14(3) of the UK Sale of Goods Act 1979, where the buyer acquainted the seller of his particular purpose, there is prima facie an implied condition that the goods delivered are fit for the above purpose, unless the seller can prove that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill or judgement.¹⁷⁶ In contrast with the UK Act 1979, the UCC imposes the onus on the buyer to prove his reliance on the seller's skill or judgement.¹⁷⁷ In other words, under the UCC, the fact that the buyer has acquainted the seller of his particular purpose does not relieve him from the burden to prove his actual reliance on the seller's skill and expertise in purchase of the goods where he seeks to sue the seller for infringement of section 2-315. In the

¹⁷⁴ UCC, Section 2-315, Comment 1. The seller is presumed to have knowledge only where such a presumption is reasonable under the circumstances. Accordingly, the seller in *Standard Structure Steel Co. v. Bethlehem Steel Corp.*, 597 F. Supp. 164, 40 UCC Rep. 1245 (D. Conn. 1984), was held not to be liable for implied warranty for particular purpose as the buyer had refused to disclose purpose of component part because of secret design.

In deciding whether the buyer has actually relied on the seller's skill or judgement to furnish appropriate article, courts often examine the comparative knowledge of the seller and the buyer in respect of the article sold. See, for instance, *Dotts v. Benett*, 382 N.W.2d 85, 42 UCC Rep. 1273 (Iowa 1986).

¹⁷⁵ *Slater v. Finning Ltd.*, *supra.*, note 95, p. 487 per Lord Steyn; *Assington Piggeries Ltd. v. Christopher Hill Ltd.* [1972] AC 441, 477 per Lord Guest; see also, Goode, *Commercial Law*, (2nd ed. 1995), at p. 334.

¹⁷⁶ See, *Tehran-Europe Co. Ltd. v. S. T. Belton (Tractors) Ltd.* [1968] 2 QB 545, 554 per Lord Denning M.R.; *Hardwick* [1969] 2 AC 31, 115 per Lord Pearce.

¹⁷⁷ UCC, Section 2-315 Comment 1; see, e.g., *Kirk v. Stineway Drug Store Co.*, 38 App. 2d 415, 187 N.E.2d 307 (1963) (householder's reliance on seller's skill and judgement in purchase of stepladder presented factual issue for jury); *Streich v. Hilton-Davis, Div. of Sterling Drug, Inc.*, 692 p.2d 440 (Mont. 1984) (commercial seed potato grower and buyer's reliance on manufacturer's skill and expertise in producing potato sprout suppressant utilised by grower presented factual issue for jury).

case of *Beam v. Cullett*,¹⁷⁸ the court of appeals held that “absent evidence that plaintiff justifiably relied on the defendants judgement in selecting the truck ... there was no implied warranty of fitness for particular purpose.”¹⁷⁹

Scope of application

On the other hand, unlike section 14(3) of the UK Act 1979, section 2-315 of the UCC does not limit the application of this warranty to the situations in which the seller is a merchant or selling the goods in a course of business. Though the warranty of fitness normally will arise only where the seller is a merchant, i.e., one who deals in goods of the kind or has knowledge or skill peculiar to the goods, it can arise in sales by non-merchants if the circumstances are such as to satisfy the statutory prerequisites of knowledge and reliance. Thus, the warranty of fitness under the UCC has broader coverage of sellers than that the one under the Sale of Goods Act 1979.

It is to be noted that this warranty is peculiar to the common law systems and there is not such an implied warranty under the civilian legal systems. Nonetheless, it might be argued that the buyer's action in disclosing his particular purpose to the seller, in fact, constitutes part of his offer to purchase. And the seller is bound to act upon this offer where he declines to reject or to amend it. In other words, under the civilian systems the warranty for particular purpose arises from the parties' agreement and it does not need to be supported by the common law statutory prerequisites. One may draw the same conclusion by considering the civilian principle of good faith which is applicable to the contract between the parties. For the seller who knows the buyer's purpose for which the goods are bought is in breach of this principle if he fails to reveal to the buyer any defect in the goods which may render them unsuitable for that particular purpose. As a consequence, the buyer, under civilian systems, may bring an action for breach of contract against the seller

¹⁷⁸ *Beam v. Cullett* (1980) Or. App. 47, 615 P.2d 1196.

¹⁷⁹ *Ibid.*, at pp. 50-51, 615 P.2d at p. 1198.

where the goods are not fit for the buyer's intended purpose if it was known to the seller at the time of the contract.

Chapter 3

The seller's Obligation as to the Quality of the goods under French Law

Introduction

The doctrine of *caveat emptor* in its original sense which was applicable in England¹ in the early 17th Century and by which the seller was liable for defective goods only if he had given an express warranty knowing that it was false, has never been accepted in any other legal systems. In other words, even the early legal systems protected the buyer against latent defects in the goods sold.² Nonetheless, the protections afforded to the buyer under these systems were not as adequate as the modern civil laws are. Under Roman law, however, the seller initially was liable only for fraud or breach of express warranty.³ Nonetheless, the concept of fraud, or *dolus*, was broad enough to include the seller's active dissimulation or trickery played on the buyer as well as his deliberate abstention in revealing of the defects in the goods to the latter. Given the fact that the seller who sells as a merchant or artisan is assumed to know of any defects in the thing sold, this means that such a seller was liable against a latent defect even if he knew nothing about the defect when he entered into the contract with the buyer. Furthermore, in contrast with the UK Sale of Goods Act 1979, the seller's liability under the express warranty covered both "*promisa*" and "*dicta*".⁴ This means that he had to bear the liability not only where he

¹ *Chandelor v. Lopus*, Cro. Jac 4, 79 Eng. Rep. 3 [1601]. See further, pp. 181-182, 193, 213-214, ante.

² For the provisions with respect of quality of the goods under Babylonian law, for example, see C.H.W. Johns, *Babylonian and Assyrian Laws, Contracts and Letters* (1904) 234.

³ J.B. Moyle, *The Contract of Sale in Civil Law: with references to the laws of England, Scotland and France* (1892) 189; Buckland, *the main institutions of Roman private law* (Cambridge (Eng.): The University Press, 1931) 272.

⁴ Moyle, *op. cit. Supra.*, note 3, at p. 190; Buckland, *op. cit. supra.*, note 3 at p.272.

gave warranty by expressly promissory words (*premise*) but also where made a representation or even description of the goods sold (*dicta*).⁵ In other words, in all instances of fraud, express warranty, implied-in-fact warranty the law protected the buyer to recover damages not only for the reduced value in the goods sold but also for the consequential loss.⁶ These provision, however, did not go far enough to protect the aggrieved buyer in those cases where the seller was neither selling as a merchant or artisan nor he was aware of the latent defect at the time of the conclusion of the contract. Accordingly, implied warranty in the sense that the seller was taken to have implicitly warranted against latent defects impairing their normal utility by the contract of sale, even in the cases where the defects were not known to him liable against, introduced into Roman law in about the first quarter of the second century B.C. by proclamation of the edicts of the aediles.⁷

Implied warranty against hidden defects under French law

As in the other continental civil systems, the warranty of quality under the French law of sale has been very much influenced by the Roman law conceptualism⁸. Accordingly, beside the express and implied-in-fact warranties the Code has imposed an obligation on the seller to warrant that the goods sold are free from any defects which impair their utility. Article 1641 of the French Code states that:

"A vendor is bound to warrant against the hidden defects of the thing sold which render it unfit for the use of which it was intended, or which impair its use to such extent that the purchaser would not have acquired it, or would only have given a smaller price if he had known of them."

⁵ *Ibid.* at p. 191.

⁶ R. Zimmermann, *The law of obligations: Roman foundations of the civilian tradition* (Cape Town: Juta, 1990).

⁷ Moyle, *op. cit. Supra.*, note 3, at pp. 194-195; *Mackeurtan's Sale of Goods in South Africa, op. cit. supra.*, note 39, part 1, chapter 1, at p. 130.

⁸ The warranty of quality in a sale under the French law Civil Code of 1804 is, in fact, the reflection of the theories of the famous pre-Code commentators, Pothier and Domat, which in turn reflect the Roman law warranty of quality. See Pothier's *treatise on contract of sale*, (Boston, Mass., L.S. Cushing's translation, 1839); 1 Domat, *Civil Law* (Strahan's Tr. Cushing's 2nd ed. 1839).

Like the Roman law, under these provisions the seller, apart from any fraud or express or implied-in-fact warranty, is in fact liable against every latent defects in the thing sold which applying the standards of reasonable person, may be said to render the article unfit for the purpose for which it was purchased, or so imperfect for such purpose as the buyer would not have bought it at that price had he known of the defects.

To afford a remedy to the buyer, the defects must be in existence at the time of sale⁹ or, in the case of generic sales, at the time of the appropriation unless it has been expressly stipulated that the object of the sale will continue to be free from defects in which case the seller will be responsible for defects arising after the sale.

The buyer may invoke the protection afforded by the Art. 1641 only if the defects were latent in the sense that a person of average competence would not have noticed them upon an ordinary inspection. This is because under article 1642 of the Civil Code the seller has been excluded from any liability for the apparent defects which the buyer could have ascertained for himself.¹⁰ It is assumed that in the cases of the apparent defects the buyer has waived the right to sue the seller for the defects. The test whether a defect was latent or not is an objective one, and therefore ignorance, credulity or inexperience of the buyer would have no effect on the seller's liabilities towards him if the defect in the thing sold were such as the ordinary prudent man would have discovered them by an ordinary inspection. Precisely how far the ordinary prudent person would be expected to go will depend on the circumstances in which the sale was taken place. The buyer of a very old car, for example, would be expected to give a rather more thorough examination than if he was buying a new one. He is considered to have waived the right to complain about such defects as would have been revealed although not about defects, which would not have been detected even, had he inspected more thoroughly. However, the defects are considered to be hidden within the meaning of the article 1641 if anything more than an ordinary inspection would be required to ascertain them. This is the case, for example, where the defects would not be detected by any means other than by complete or partial destruction of the thing purchased. Similarly, the defects, which could be discovered only through expert knowledge or

⁹ Morrow, "Warranty of Quality: a Comparative Survey" (1940) *XIV Tulane Law Review* 529, 531.

scientific method, are treated as a latent one for there is no obligation on the part of the buyer to employ such methods in inspecting of the goods.

The seller's knowledge of existence of defect irrelevant

Like the aedilitian edicts, Article 1643 of the French Civil Code provides that:

"He [the seller] is responsible for the hidden defects, even if he did not know of them, unless it has been stipulated that he would not be bound by any warranty in such case "

This means the seller's knowledge or ignorance of the latent defects is not material for existence of his liability for such defects, although it may affect the extent of his liability in this respect. Since this liability has been imported into the contract by the law and it arises from the mere fact of the sale itself. In other words, unless otherwise agreed by the parties the mere fact that the seller was in perfect good faith in dealing with the buyer in the sense that he was unaware of the latent defects in the goods will not relieve him of liability for the defects.

Exclusion of the seller's liability for the hidden defects

The seller's liability for latent defects may be negated by inserting a non-warranty clause in the contract of sale. But such a non-warranty clause is valid only if he did not know the defects at the time of the sale. Article 1643 Of the Civil Code does not specifically deal with the situation where the seller was in bad faith in excluding his responsibility for the latent defects by a non-warranty clause despite the fact that these defects were known to him before the sale. Nevertheless, the majority of the French authorities, by referring to Article 1628 of the Civil Code (on warranty against eviction) defend the idea that in such a case the insertion of the non-warranty clause in the contract is not valid. According to article 1628:

"Even if it is stated that the vendor is not to be subject to any warranty, he

¹⁰ For the full provisions of Article 1642 of the French Civil Code, see Appendix III.

nevertheless remains liable to warranty against his personal act: any agreement to the contrary is void."

It is, in fact, said that knowledge of the defects by the seller and his failure in disclosing of them to the buyer is fraud and the law does not permit him to contract out of his liability for fraud¹¹. There is a ground which maintains that the non-warranty clause which takes the form of stipulating expressly that the buyer purchases the goods "at his own risk and peril" is effective against him even if the seller is not in good faith. This notion is based on analogy to Article 1629 of the Civil Code (also on warranty against eviction) which provides:

"Even in the case of a stipulation of no warranty, the vendor is bound in case of ejectment to return the price, unless the purchaser knew at the time of the sale the danger of being ejected or unless he made the purchase *at his own risk and peril*." (Emphasis added)

It seems, however, that even where the buyer has purchased the goods "at his own risk and peril" he might still sue the seller if he can prove that the latter were guilty of active fraud (as distinguished from mere non-disclosure)¹².

It is to be remembered, further, that under the Roman maxim of *spondet artis pertiam* which both the French doctrine and the French jurisprudence have frequently used a merchant or artisan is presumed to know of any defects in the things he sells¹³. This means that under the French law merchants and artisans are restricted severely to contract out their liability for the defects by a non-warranty clause. Since, as pointed out, such contractual clauses are effective only if the seller does not know the existence of the defects when he sells the goods.

Effect of the buyer's delay on his right to bring redhibitory action against the seller

¹¹ To the same effect see Swiss Code of obligations, Art. 199; German Civil Code, Arts. 464, 476. The South African law recognises this general principle of the civil law. See *Mackeurtan's Sale of Goods in South Africa*, *op. cit. supra.*, note 39, part 1, chapter 1, at p. 141.

¹² See French Civil Code, Art. 1110.

¹³ Pothier, *op. cit. supra.*, note 8, p. 131; Morrow, *op. cit. supra.*, note 9, p. 539.

As mentioned, the seller has no liability vis-à-vis the buyer for the defective goods in the cases where the defects are apparent or where they would be ascertained by the exercise of reasonable care. In such instances the buyer is required to notice the defects and reject the goods at the time when the sale is made or, at least at his first opportunity to inspect. The buyer who has failed to comply with these requirements will be taken to have elected to accept the goods as they are so far as their patent condition are concerned.

A rather different and difficult question is whether the buyer is under a duty to inspect or examine the goods for latent defects within reasonable time or be held to have lost the protection afforded by the Code when eventually the defect emerges. The view that there is such a duty might be criticised by arguing that the seller is the man who has defaulted in the contract by delivering of the defective goods. This default should not be taken to penalise the innocent purchaser by imposing on him a burden, which he would not have otherwise to bear. In response, it might be pointed out that the argument does not correspond with the principle of good faith upon which the contract of sale is based. Since the buyer's laches in inspecting of the goods for the hidden defects and his delay in rejecting of them upon detection of such defects will irrationally prejudice the seller. In other words, the purchaser would loss the right to rescind the contract or claim for any damages where he fails to ascertain the defects and offer to return the goods within a reasonable time after the defects are or should have been detected. Nevertheless, if there is an established custom of trade according to which the goods purchased can be stored for sometimes without being inspected, the buyer may sue his seller for the redhibitory defects when they are eventually discovered provided he can demonstrate that his failure to reject the goods timeously was due to his compliance with the custom of trade.¹⁴

According to Article 1648 of the French Civil Code:

The action resulting from defects which render the sale void must be brought by the purchaser within a brief delay according to the nature of the defects and the custom of the place where the sale was made."

¹⁴ Morrow, *op. cit. supra.*, note 9, at p. 532.

Once a defect warranting rejection is discovered the buyer has, within a "brief delay", to elect whether he will return the goods or keep them and claim a reduction of the price. If he does not elect to reject within this period he loses his right to do so, although he will not necessarily lose his right to claim reduction of price while retaining the goods.

Unlike the Roman law and other modern civil codes¹⁵, however, the lengths of the prescriptive periods for the redhibitory actions and the action *quantum minoris* have not been specified, but are placed in the discretion of the judge and may vary depending upon the custom of the place where the sale was made.

This wide discretionary power in the lower court judge and the reference of the problem of prescription of the actions for defects of quality to the customary law have been the cause of much confusion in this phase of the French law. Clearly, under provisions of Article 1648 the purchaser has a duty to institute suit against the seller within a "brief delay, therefore, a complaint made or proof of defect offered the seller is not enough for the fulfilment of such duty. Nonetheless, there has been dispute over the time from which the delay can be calculated and while under some authorities the delay begins to run from the day of the sale or perhaps from the day of delivery if the delivery is not accompanied with the sale, the others insist that the delay must be computed from the time when the defects are detected by the buyer.¹⁶

It is to be noted, however, that in the cases of express contractual warranty against the defects the buyer has to resort to the usual prescription of actions for breach of contract¹⁷. It must, further, be remembered that the prescription period for fraud is ten years.¹⁸

The buyer's remedies for the breach of warranty of quality

Article 1644 Of the French Code states that:

¹⁵ See e.g., Article 477 of the German Civil Code; Article 210 of the Swiss Code of Obligations.

¹⁶ Morrow, *op. cit. supra.*, note 9, at p. 545.

¹⁷ See Cass.-req., 20 juin 1932, S. 1932. 1. 343 and note.

¹⁸ Art.1304, French Civil Code; See further, p. 275, post.

"In the cases specified in Article 1641 and 1643 the buyer may elect either to return the thing and have the price repaid to him, or to keep the thing and have such part of the price repaid as shall be decided by expert."

That is, where latent defects destroying or impairing the use of the goods purchased are discovered by the purchaser he will have an option to resolve the sale and to recover the purchase price from the seller or retain the defective goods and sue the latter for diminution of the price. As can be seen, the remedies available to the purchaser for a latent defect under these provisions clearly correspond with the remedies offered to him by the Roman law for adulation defects. The purchaser is entirely free to bring either of the actions which he wishes against the seller in any of the three cases enumerated in Article 1641 of the Civil Code. Under that Article the buyer will be protected in the cases a) where the latent defects destroy the utility or effectiveness of the goods for the purpose for which it has been purchased or for which it is commonly used or, b) where the defects impair the use of the goods to such extent that he would not have purchased them had he known of the defects or, c) where the defects impair the use to such extent that he would have paid only a smaller price they were known to him at the time of the sale. In any of these three circumstances, the buyer is entitled either to resolve the sale or to ask for reduction of the price in a proportion determined by special officers of the court who are *experts* and act as appraisers. In contrast with the Iranian system, he will continue to retain this option until the time when one remedy or the other is obtained. Until that time, in other words he can shift from one remedy to the another¹⁹.

Like the Roman law, the ideal in the case redhibition is restoration to the *status quo*. The buyer, who chooses to avail himself of this remedy, must be able to restore the seller to his original position by returning the goods in the condition in which he received them before. Thus the buyer can not obtain redhibition where he has encumbered the property with real rights unless after removing of the encumbrances or compensating the seller for them. Moreover, where the defective goods have been used up by the buyer or where they have been alienated by him and can not be returned he cannot obtain redhibition, although he may still avail himself of

¹⁹ *Ibid.*, at p. 536.

the action *quantum minoris*. Nevertheless, this rule is not an absolute one and in certain situation it is relaxed where equitable considerations so require. Article 1647 of the French Code states:

"If the thing which had defects perishes owing to its bad condition, the loss falls upon the vendor and he is bound towards the purchaser to return the price and to make the other amends specified in the two foregoing articles²⁰. But if the loss happens by accident, it falls upon the purchaser."

Therefore, the purchaser is not required to restore something, which has been destroyed due to the defect complained of, or something which has been perished in the course of its normal use and from which the buyer has derived no benefit because of the defect. For in such circumstances it is, in fact, the seller who has to bear the blame either for breach of contract or for latent defects and consequently, the law ought not permit him to retain the price against the buyer who has obtained little or no benefit yet is unable to return the property for any of the foregoing reasons.

Unlike the Roman law, however, the French Code has adopted a rule which precludes the buyer from his right in bringing of redhibitory action in the cases of accidental destruction of the defective goods. This is unfortunate as in practice it is often very difficult, if not impossible, to discover whether the goods perished by accident or by the reason of latent defects in themselves.

The jurisprudence has developed a third remedy, which has not been referred to in the Code. According to the *astreinte* the seller in the case of sale of defective goods like any other obligors in the instances of inadequate performance of obligations under the French law, is bound to complete his duties by repairing of the defects in the goods. In other words, the buyer of defective goods may, instead of suing the seller for redhibition or reduction of the price, seek for a court order requiring the latter to repair them within a certain time where such defects are repairable and it is perfectly reasonable to have them repaired. The court will enforce this remedy by imposing a large pecuniary penalty upon the seller who declines to comply with the requirement—usually a fixed sum for each specific period that the seller delays²¹.

²⁰ These two articles, i.e. Articles 1645 and 1646 will be discussed latter.

²¹ See Brodeur, "The Injunction in French Jurisprudence" (1940) 14 *Tulane Law Review* 211.

There is an additional ground for the buyer to take action against the seller where he is not satisfied with the defective article delivered by the latter. The buyer may seek to have the contract declared void for the article's mistake as to the substantive qualities and its ability to perform in the expected manner. The existence of the latent defect does not prevent the buyer basing his action on the mistake as to the substantive qualities of the goods.²² As it will be seen later redhibitory defects as defined by Article 1646 of the French are, in fact, merely a special application in the field of sales of the broad concept of error *in substantia* in the general field of obligations which renders the consent of the buyer null and whereby allows him to avoid his transaction with the seller.²³ The only point of divergence from the analogy to the principles of vices of consent is found in Article 1648 which requires the redhibitory action and the action *quanti minoris* to be brought within a "brief delay" whereas an action of resolution for error or fraud is ten years under Article 1304 of the Civil Code.

Amount recoverable on redhibition

The amount recoverable by the purchaser in the case of redhibition under the French law is very much depend on whether or not the seller was acted in good faith in dealing with the former. In other words, although the seller's responsibility for latent defects exists independently of his knowledge or ignorance of the defect his state of mind is material as regards the extent of his liability against the buyer. Accordingly, Article 1645 of the Civil Code states that:

"If the vendor knew of the thing, he is bound not only to return the price which he has received, but he is also liable to the purchaser for all damages."

The drafters of the French Code have, in fact, intended to penalise the bad faith vendor who sells the goods knowing their defective nature to the extent of not only returning of the price to the purchaser but also of paying the latter damages. On the other hand, according to Article 1646 of the French Code:

²² Cour de Cassation, 3rd Civil Chamber, 18 May 1988, IR 155.

²³ See *supra.*, notes 82-88.

"If the vendor was ignorant of the defects of the thing, he shall only be bound to return the price and to reimburse to the purchaser the expenses occasioned by the sale (*fair occasions par la vente*)."

In other words, where the seller was in good faith in the sense that he did not know of the defect at the time of the sale he has no liability against the damages sustained by the buyer in the sale. The phrase "expenses occasioned by the sale" in this article may well refer to the expenses which the purchaser ordinarily must pay for drawing the contract and the other charges relating to the sale under Article 1593²⁴.

The purchaser is generally required to prove knowledge of the defects on the part of the seller before the latter can be required to indemnify him for the damages caused by the defects. This is likely to produce a harsh result against the purchaser since it is very difficult for him to establish such knowledge by the seller in most instances. It means that in such instances the seller will have no liability against the damages caused by the defects even if he has acted in bad faith in the sense that he knew of the defects at the time of the sale. The fact that the purchaser might sue in tort under Articles 1382 and 1383 of the Code does not also go far enough to afford him much relief since such a remedy is available only if he can demonstrate "fault" on the part of the seller.²⁵

Nevertheless, the purchaser may resort to the Roman *maxim* of *spondet artis peritiam* and bring an action for damages under Article 1645 without being obliged to prove knowledge of the defects by the seller, in the cases where manufacturers or professional dealers sell the goods. For sellers in such cases are presumed to know of the defects in their goods sold and thus liable for all damages under Article 1645.

It is to be noted, however, that the French jurisprudence has been so developed as to allow the purchaser to sue for damages even where the seller was not aware of the defects in the goods. This development has been obtained by means of what is called as "misinterpretation" of Article 1646²⁶. The Courts have broadened the historical meaning of the phrase "expenses occasioned by the sale" by asserting that it refers to damages, which the sale of defective goods has caused the purchaser. This

²⁴ For the provisions of Article 1593 of the French Code, see Appendix III.

²⁵ For the provisions of Articles 1382 and 1383 of the French Code, see Appendix III.

²⁶ Morrow, *op. cit. supra.*, note 9, at p.539.

development in the jurisprudence did not take place until nearly half a century after the adoption of the Code Napoleon. The reason for such development has been said to have based on the fact that originally goods were not sold very frequently for the purpose of resale, but the expansion of the trade and commerce resulted in reselling of goods by more and more buyers who had to suffer in various ways if goods turned out to be defective. This phenomenon led the courts to hold that the buyer must be indemnified by the seller in such cases, irrespective of the fact that the latter may have been in good faith and not responsible in damages under a restrictive interpretation of Article 1646 of the Code. It was argued that the various type of injury sustained by the buyer were "expenses occasioned by the sale", for which the seller was bound to reimburse the buyer under Article 1645.

In 1847, the Court of Cassation for the first time used such interpretation of Article 1646. The buyer purchased a special kind of fertiliser for the purpose of reselling it to farmers. The fertiliser was defective and unfit for use. The farmers obtained redhibition of their contract with the buyer. The latter, in turn resolved the sale with the original seller and sought for the return of the price and the "expenses occasioned by the sale", and also the expenses occasioned by the resale which he had been bound to reimburse to the sub-buyer. This demand was accepted by the judges of the Court who based their decision on Article 1646 arguing that the items in the demand were not "damages" which were specifically denied, but were expenses occasioned by the sale.²⁷

In 1852, the buyer who obtained redhibition of the sale of a house for latent defects was held to be entitled to recover from the innocent seller not only the price but also the increased value of the house caused by improvements the buyer had made upon it after the sale²⁸. In approving the decision by the Dalloz report on the case, it was pointed out that any other result would allow unjust enrichment of the seller, and that analogy to Articles of the Code on warranty against eviction²⁹ also supports the conclusion. Further, this note demonstrated for the first time that one may distinguish

²⁷ Cass.-req., 29 juin 1847, S. 48. 1. 9.

²⁸ Cass.-civ., 29 mars 1852, D. 52. 1.65 and note. See also S.52. 1. 321.

²⁹ E.g., Article 1634. See also Articles 861, 2175, of the French Civil Code.

between *damnum emergens* and *lucrum cessans* as elements of *damages-interest*,³⁰ and that a bona fide seller might validly be compelled to reimburse the buyer for the former but not for the latter, without violence to Articles 1645-1646.

In 1859 the Court of Cassation gave an even more extensive interpretation to the phrase "expenses occasioned by the sale". In that year a buyer in obtaining redhibition of the sale of copper sheathing was granted to recover both the price and also the costs of removing the defective sheathing and replacing it. In other words, the court did not consider these costs as damages but as expenses occasioned by the sale under Article 1646.³¹

Again, in 1870 the Court of Cassation used Article 1646 as a basis of its decision in a case involving the sale of defective starch. In that case the buyer resold the starch to the sub-buyers and by reason of its defects became involved in several lawsuits with them, incurring travelling expenses in settling these lawsuits, as well as injury to his commercial reputation. A lower court decided that he could recover these items from the original seller. This decision was approved by the Court of Cassation which also relied on the delictual Articles 1382 and 1383 of the Code.

In another case in 1886, involving the sale of seed which because of its redhibitory defects did not germinate the Court of Rouen again relied on Article 1646 and, in an unprecedented decision, allowed the buyer to recover the price, the expenditure made by him in preparing the soil for planting, and also "the profit which he lost by failing to make a crop". In fact, this decision goes beyond any other French cases in so far as it requires the good faith seller to reimburse the buyer for *lucrum cessans*, or loss of profit by the buyer, as "expenses occasioned by the sale"³².

The decision which climaxed this line of cases came in 1925. A buyer of a defective automobile brought a redhibitory action against the manufacturer-seller who disproved fault or any knowledge of the defect on his part at the time of the sale. The seller held to be liable for damages sustained by the buyer including the expenditure,

³⁰ Article 1149 of the French Civil Code. See Fuller and Perdue, "The Reliance Interests in Contract Damages" (1936) 46 *Yale Law Journal* 52, 55.

³¹ Cass.-req., 4 janvier 1859, S. 59. 1. 936.

³² Rouen, 22 mai 1886, S. 88. 2. 166.

which the latter had to pay to the victim of the accident.³³ The Court of Cassation considered such expenditure as part of the "expenses occasioned by the sale", within Article 1646 of the Code. The decision, in other words, goes beyond the prior cases in so far as it requires the seller to reimburse the buyer for tort liability incurred by the latter as a result of the defect, whereas under the previous cases he was liable only for the contractual damages sustained by the buyer in the sale. The Dalloz report of the case³⁴ has an statement from M. Celice, counsel for the buyer, in which he argued that changed economic situation justified disregarding the historical background of the codal text, that there was no need to invoke the delictual Articles of 1382 and 1383 and that the notion of *spondet peritiam artis* was superfluous. It appears that the Court of Cassation has accepted this view, basing its decision solely on Article 1646. The method, which was used by the court in reaching the decision, has been severely criticised by M. Jossierand in a note which is also included in the Dalloz report.³⁵ Referring to the historical background of Articles 1645 and 1646, he argued that a clear-cut distinction was intended between good faith and bad faith seller and that the courts since 1847 have not genuinely interpreted Article 1646. According to him, the court should have based its decision on the Pothier's Roman doctrine of *spondet peritiam artis* under which such sellers as the manufacturer-seller in the current case are presumed to know of all defects in their wares sold. Accordingly, the seller in this case would be liable as a bad faith seller for all damages caused by the defect to the buyer under Article 1646.

At the first glance it appears that the distinction between the respective liabilities of good and bad faith sellers under Articles 1645 and 1646 of the Code has been wiped out by the French jurisdiction. It is to be pointed out, however, that this view is not, strictly speaking, true since Article 1645 requires the seller to reimburse the buyer for all damages, both the *damnum emergens* and the *lucrum cessans* of the civil law, those sustained both through actual loss or expenditure and by way of failure to achieve

³³ Cass.-req., 21 octobre 1925, S. 1925. 1. 198, D. 1926. 1. 9.

³⁴ D. 1926. 1. 9.

³⁵ *Ibid.*

anticipated profits³⁶ whereas, in all the cases in which good faith sellers have been condemned for damages under Article 1646, they have been compelled to repay only the *damnum emergens*, but not the *lucrum cessans*.³⁷ Accordingly, it could be said that the French law to a limited extent has retained the distinction intended in the Articles 1645 and 1646. That is where the good faith seller is held to be liable under Article 1646, his liability does not extend to *lucrum cessans*, or the buyer's loss of profits.³⁸

Express warranty under French law

It is to be noted that the preceding remarks are by way of comment upon Articles 1641-1649 which imposes a very broad implied-in-law warranty upon the seller whereby he is bound to deliver goods which are free from latent defects. In other words, the warranty imposed by these Articles will protect the buyer against such defects even if there has been no express or implied-in-fact representations about the goods in the sale. In view of the broad protection of buyer afforded by the law it is not surprising that the common law "express warranty" has not been resorted to frequently by them. For the same reason it appears that the French legislators have omitted to address the issue of the express warranties by the seller³⁹ and that the commentators have chosen to say nothing about the so-called *garantie de fait* (warranty-in-fact, as distinguished from the implied-in-law warranty imposed by the Civil Code upon the seller).⁴⁰

Of course, under the general principle of freedom of contract the parties are allowed to agree on a warranty (*garantie de fait*) other than the one imposed by the law, which may increase or decrease the seller's responsibility as to the quality of the

³⁶ Cass.-req., 17 mars 1926. S. 1926. 1. 371

³⁷ Except in the case, Limoges, 20 avril 1887, S. 88. 2. 156.

³⁸ See Celice and Josserand, D. 1926. 1. 9.

³⁹ See Williston, *Contracts* (Rev. ed. 1937) vol. 5, 4117. "Express warranties are not mentioned in the Code. They do not seem to occur frequently and their legal effects are doubtful."

⁴⁰ See M. Planiol et G. Ripert, *Traité Pratique de droit civil français X* (1932) p. 147. Contrary to the French Civil Code, the subject of express warranty has been dealt with by Article 459(2) of the German Civil Code. similarly, the omission of the French Code with regard to express warranty is repaired by Austrian Civil Code (ABGB) Section 922 under which the seller must warrant that the goods will have both the stipulated and/or the customarily required characteristic. Accord: Article 197 of Swiss Code of Obligations.

goods sold. The notion that the parties may freely agree on any warranty concerning quality of the goods can also analogously be deduced from the provision of Article 1627, on the warranty against eviction, which states that:

"the parties may, by special agreement, add to this legal obligation or reduce its effect: they may even agree that the seller shall not be subject to any warranty."⁴¹

However, a problem may arise in the cases where an express stipulation is used to broaden the legal warranty of the Code which is already so liberal in protecting the buyer against any redhibitory defect in the goods. Redhibitory defects are those which impair use. The contract may well provide that the goods shall possess certain qualities, the absent of which might not necessarily affect their intended use, and the presence of which may enhance its value or desirability without increasing its utility. In such circumstances it might be argued that the parties have intended to replace the legal warranty of Article 1641 with the contractual warranty which has been expressly agreed upon by them in the sale with the result that the buyer would not be able to avail himself from the right to invoke the redhibitory protection of the Code.⁴² Of course, the intention of the parties is a question of fact in any given case⁴³, therefore, it is not possible to make a precise statement. However, the review of the cases will indicate that the French courts are more likely to consider such an agreement by the parties as a special warranty which has contractually substituted for the implied-in-law warranty imposed by the Code. Consequently, none of the provisions of Articles 1641-1649 will be applicable to the case. In 1883, e. g., a constructor seller of machinery expressly warranted it against "all defects of material and of working".⁴⁴ The argument that the parties had excluded the operation of Articles 1641-1649 of the Code by agreeing upon insertion of the express warranty in their contract, was upheld by the court which ordered specific performance of the express warranty but refused to awarded any

⁴¹ The issue of exclusion of legal warranty of the Code concerning the quality of the goods by the seller under the Article 1643 has been referred to previously.

⁴² See Planiol et Ripert, *op. cit.* note 40, n 140, p. 147.

⁴³ *Ibid.*; See also Cabs. -cav., 17 november 1902, D.1902. 1. 566.

⁴⁴ Cabs.-re., 25 juin 1883, S.85. 1. 422.

damage to the buyer for its breach by the seller.⁴⁵ It appears, in other words, that the interests of the buyer under the French law are likely to be more safeguarded by relying on the implied-in-law warranty imposed by Article 1641 rather than providing for warranty of quality by contract.

Further problem arises in connection with situations where the seller warrants that the object of the sale will remain in good working order for specific period of time (*garantie de bon fonctionnement*).⁴⁶ It seems that the buyer usually resorts to the doctrine of *astreinte* as a remedy against the seller where such a warranty in the contract is breached. That is he may ask the court to order the seller to repair or to replace the article that is not functioning properly.⁴⁷ In fact, in the case of breach of such a contractual warranty the court will enforce a type of specific performance by penalising the seller severely for every day of his non-performance with the effect that Articles 1641-1649 will ordinarily be excluded from application.⁴⁸

It seems that recourse to the general Articles of the French Code on the performance *vel non* is necessary if express and implied-in-fact warranties under the French law are to be considered properly, since as pointed out earlier, the Code is silent on the issue of express warranty made by a seller. If the seller by such a contractual warranty is considered to have made promises (express or implied-in-fact) to deliver goods of certain qualities or having certain characteristics, it is then clear that he is liable for damages to the buyer in so far as he has failed to fulfil those promises.⁴⁹ A fundamental question for the buyer is whether he is entitled to avoid the sale and to claim damages for the breach of a promise. According to Article 1184 of the French Civil Code:

"A resolutory condition is always implied in synallagmatic contracts, in case one

⁴⁵ Relying upon an analogy to Article 1152, the court argued that agreement for liquidated damages will not be disturbed. For a similar case see also Cabs.-cav., 20 december 1887, D. 89. 1. 76. See further Paris, 9 december 1930, S.1931. 2. 70.

⁴⁶ P. Kelly, *European Product Liability* (Butterworths 1992), Ch. 5. pp. 109-110; Planiol et Ripert, *op. cit. supra.*, note 40, n 140, p. 147.

⁴⁷ *Ibid.*

⁴⁸ Accordingly, the action against the seller for failing to perform this contractual warranty is not subject to the limitation period provided under Article 1648 of the Code. See Cour de Cassation, commercial Chamber, 2 May 1990, JCP 1990, IV, 246.

⁴⁹ See Article 1146 et seq., French Civil Code.

of the two contracting parties does not fulfil his engagement.

In such case the contract is not cancelled as a matter of right. The party complaining that the obligation has not been fulfilled has the choice either between compelling the other party to carry out the agreement when it possible, or demanding its cancellation, with damages.

The cancellation must be applied for in court and the defendant may be given time, according to circumstances."

This means that the seller's failure to carry out his promises (express or implied-in-fact) in delivering of goods of certain qualities or free from defects will give rise to a right in the buyer whereby he may apply for specific performance or for resolution of the contract with damages. If the buyer has not yet paid the purchase price he is no longer required to do so; and if he has already paid the price, he may recover it from the seller. In either case he is entitled to damages also.⁵⁰ Article 1184 has established a wide discretionary power in the court over the issue of resolution of the contract. This means that only through the court's decision an aggrieved buyer may avoid the contract. The court will, in the first instance, decide whether the contract has been broken and if so whether the breach is substantial or non-substantial and trivial in nature. In most instances of potential breach of warranty there has been a partial performance. That is the goods have been delivered by the seller, but he has failed to fulfil completely his promises about them, or he has been merely unsuccessful in performing of collateral promises, rather than the principal ones. In contrast with Anglo-US law, French law has made no attempt to formulate specific iron-clad rule about the issue of substantial performance and, therefore, the matter is left to be decided within discretion of the court. In the case of non-substantial breach the buyer will be granted only damages, and not avoidance of the sale. Nevertheless, if the breach is substantial and material, although merely partial, the court will allow the buyer both to avoid the sale and to recover damages from the seller.⁵¹ However, the parties may limit the court's discretion strictly to the question of whether the contract has been breached by providing that in the case of non-performance there shall be a dissolution *de plein droit*.⁵²

⁵⁰ For a detailed discussion of non-performance of a promise by the parties see Monroe, "The Implied Resolutory Condition for Non-performance of a Contract" (1938) 12 *Tulane Law Review* 376; Williston, *Contracts* (Rev. ed. 1937) vol. 3 at p. 2539.

⁵¹ See Williston, *op. cit. supra.*, note 50, at p. 2549. and authorities there cited.

⁵² See Williston, *op. cit. supra.*, note 50, at p. 2547

It is to be noted that an action based on Article 1184 against the seller for non-performance of his obligation to deliver goods conforming to the purchaser's order or contractual provisions is not subject to the same rules as the liability for hidden defects and does not have to be initiated within the short limitation period required by Article 1648 of the Code.⁵³ In accordance with the general rules of contract liability, the limitation period in such instances is ten years starting from the time when the damage occurred if the action is against a professional seller and thirty years if it is taken against a private seller. It has, however, been held that a contractual clause stipulating for a shorter limitation period is valid if it agreed between the parties who are professionals⁵⁴ in the same area of expertise.⁵⁵

The basis of the seller's liability for breach of warranty

Unlike the common law of warranty which had its origin in tort, the civil law of warranty has been analysed always from the contractual point of view. The civil law of warranty is but the application to a specialised type of contract of general rules of conventional obligations and the vices of consent.⁵⁶

Concerning express and implied-in-fact warranties under the civil law, the conception is one of liability on the part of the seller for breach of a promise given in exchange for another promise. That is, if a contract has been made as to the qualities of the goods, based upon either direct or indirect declarations of will of the parties, all of the consequences follow which ordinarily result from such agreement simply because they have been made, and quite irrespective of such common law prerequisites as "deceit" or "reliance". Under the modern French law, although express and implied-in-fact warranties receive little attention by the Civil Code, the controlling concepts are those which relate to the non-execution of promissory obligations generally. Therefore,

⁵³ Cour de Cassation, General Assembly, 7 February 1986, JCP 1986, II 20616; 1st Civil Chamber, 5 November 1985, Bull Cav I, no 287 and 13 December 1989, Bull Cav I, no 393.

⁵⁴ I.e. suppliers, distributors or producers. The French court has consistently assumed that a professional seller has been aware of the defect in the goods sold

⁵⁵ Cour de Cassation, Commercial Chamber, 5 July 1988, unpublished, no 86-19342.

⁵⁶ Planiol et Ripert, *op. cit. supra.*, note 40, pp. 124, 198; Colin A. et Capitant H., *Cours élémentaire*

the buyer may acquire damages for breach of express or implied-in-fact warranty of quality by invoking of Article 1146 of the French Civil Code, which generally deals with damages for breach of promises. In such instances (i.e., where the seller is in breach of express or implied-in-fact warranty) the buyer has his option of specific performance or of resolution of the contract with damages irrespective of whether the breach of express or implied-in-fact warranty amounts to non-substantial performance of the contract of sale or not, since even in the former case the buyer may assert the implied resolutive condition of Article 1184 and ask the court for dissolution of the contract⁵⁷. In other words, there is nothing peculiar about express or implied-in-fact warranty which distinguishes it from the ordinary promise, certain consequences follow simply because the parties has entered into the contract by an exchange of promises and the seller has failed to fulfil one of his promises.

With regard to the civilian implied-in-law warranty of quality, it is said that the seller has made no declaration of will (direct or indirect), therefore there has been no promise on his part to be breached by delivering of the goods which suffers from latent defects yet it has been deemed to be wise to impose a legal obligation upon him. Promises are exchanged in any sale: the seller promises to deliver certain agreed article and the buyer agrees to pay for it.⁵⁸ But in many instances nothing is said or done about the quality of the article. Like any other contract, however, the sale is not perfect without consent of the parties thereto and may be avoided by them.⁵⁹ It is to be noted that under the civilian tradition this is not considered as breach of contract, but resolution because of a vice of consent, a basic conception of the civil law of conventional obligations.⁶⁰ As to implied-in-law warranty, it has been argued that the defect in the article makes the object of the sale other than that agreed upon by the parties. This vitiates the consent of the buyer and renders the contract of sale imperfect. In other words, conceptually warranty of quality is but a particular application of the

de droit civil francais II (7e éd. 1932) p.534.

⁵⁷ See Planiol et Ripert, *op. cit. supra.*, note 40, p. 126.

⁵⁸ Art. 1582, French Civil Code.

⁵⁹ "Three circumstances concur to the perfection of the contract, Towit: the thing sold, the price and the consent." Art. 2439, La. Civil Code of 1870.

⁶⁰ See Arts. 1108-1122, French Civil Code; Holstein, "Vices of consent in the Law of Contracts" (1939) 13 *Tulane Law Review* 362.

principles of vices of consent in the law of obligation.⁶¹ Accordingly, one should not be astonished when he discovers that the consequences of an imperfect contract follow where it transpires that the goods delivered by the seller are defective.

This correlation in the civil law between redhibitory vices and vices of consent can also be demonstrated by a close consideration of the Articles of the French Civil Code. According to Articles 1116 and 1117, vices of consent resulted from error, violence, or fraud give rise to actions for avoidance of the contract.⁶² Article 1110 of the Code, however, states that error is not cause of avoidance of a contract, "unless it rests upon the very substance of the thing which is the object thereof". Under Article 1641 redhibitory defects are those, which seriously impair the use of the goods, sold. It would appear that "substantial error" is involved in those transactions where such defects exist but are unknown to the buyer. That is the concept of the substantial error is broad enough to cover the more restricted one of the redhibitory defects, which must impair the use of the object of the sale. This idea has been supported by the view of the prevailing construction of Article 1110 of the French Code, which "interprets error *in substantia* as equivalent to a misconception affecting a substantial *quality* of the object".⁶³ There are, nonetheless, instances in which error may "rest upon the very substance" of the object of the sale, and yet its use not be impaired. Consequently, it could be said that redhibitory defects under Article 1641 are merely a special application in the field of sale contracts of the broad concept of error *in substantia* in the general field of obligations.

The seller's liability against the sub-buyer for the defects in the quality of the goods

The remedy of the sub-buyer is another issue which has been considered by the French civil system. Unlike Anglo-US and Iranian law there is no such obstacle as "privity of

⁶¹ See Colin et Capitant, *supra.*, note 56, p. 536; Planiol et Ripert, *supra.*, note 40, at p. 126.

⁶² For the full text of the Articles 1116 and 1117 of the French Civil Code, see Appendix III.

⁶³ See Holstein, *supra.*, note 60, at p. 375 et seq. See also Laurent, *Principes de droit français XXIV* (5^{ed.} 1893) p. 272, where it is agreed: "But the error which causes the vendee to be unable to use the thing, is this not the most substantial of errors?"

contract" in this system to debar the sub-buyer from resorting to the remedies available to the buyer under the French Code.⁶⁴ In fact, while some of the decisions are clearly based on Article 1382, the delict Article of the Code, it is just as clear that the warranty and the remedies of Articles 1641-1649 are available to the sub-buyer as well as the buyer.⁶⁵ This means that a buyer can bring an action founded on liability for latent defect, not only against the seller that sold the goods to him, but also against any prior seller in the chain of supply including the manufacturer.⁶⁶ Where the original buyer has been sued for the defective goods, he may, by means of elastic methodology of the "call in warranty", make the original seller a party in the cause, determining all the issue in one suit.⁶⁷ This solution adopted by the courts is based on the idea that by reselling the goods the buyer has transmitted to the sub-buyer all rights, which were conferred upon the buyer by the original sale.⁶⁸

The buyer may bring an action against the seller who sold the goods to him and the manufacturer, who will be held jointly liable for the damages caused by the defective goods⁶⁹, but only the seller to whom the goods are returned will have to repay the purchase price.⁷⁰

However, an action by the sub-buyer against any prior seller may not succeed if any of the intermediate buyers has had knowledge of the defect in the goods.⁷¹ Moreover, it has been held that the sub-buyer who is entitled to obtain damages from the manufacturer cannot seek to rescind the contract of sale in the cases where the purchase price in the successive sales was significantly different.⁷²

The sub-buyer of an article may also bring proceedings against the prior seller to rescind his contract and to claim damages on the basis of the product's "lack of

⁶⁴ See Smith, "Third Party Beneficiaries in Louisiana: The stipulation *Pour Autrui*" (1936) 11 *Tulane Law Review* 18.

⁶⁵ Planiol et Ripert, *op. cit. supra.*, note 40, p. 145.

⁶⁶ Cour de Cassation, 1st Civil Chamber, 9 October 1979, Bull Cav I, no 241.

⁶⁷ Planiol et Ripert, *op. cit. supra.*, note 40.

⁶⁸ Planiol et Ripert, *op. cit. supra.*, note 40, p.145.

⁶⁹ Cour de Cassation, Commercial Chamber, 15 May 1972, Bull Cav IV, no 144.

⁷⁰ Cour de Cassation, Commercial Chamber, 17 May 1982, Bull Cav IV, no 182.

⁷¹ Cour de Cassation, 1st Civil Chamber, 13 May 1981, Bull Cav I, no 165.

⁷² Cour de Cassation, Commercial Chamber, 27 January 1973, JCP 1973, II, 17445.

conformity" to specification or the contract's provision.⁷³ The courts have given no juristic reason for such an action by a sub-buyer, but it may well be argued that the right of action of the previous buyer against his seller is subject to the general rules of contractual liability and as such it can vest in the sub-acquirer. In other words, the seller's failure to fulfil his obligation to deliver a "conforming" article will give rise to a right in the buyer to take action against him. And this right of action of the buyer against his seller is transmitted to the sub-buyer of the article. However, a sub-buyer can not take any action against a prior seller for the lack of conformity of the goods when such lack of conformity arises from a breach of specific contractual provisions for which the prior seller is not liable, since he was not a party to that particular contract.

⁷³ Cour de Cassation, 1st Civil Chamber, 9 March 1983, JCP 1984, II, 20295.

Chapter 4

Warranty of Quality of Goods under Iranian Law

Implied warranty against latent defects

The Iranian law of sale has been derived mainly from the Islamic legal system, and, as such, it requires, in the case of each and every bargain, that there be honourable dealing on the part of the parties concerned. As to the seller, this means that he has a duty to supply a sound and price-worthy article, even if there is no stipulation in the contract to this effect.¹

This requirement imposes on the seller a duty of directing the buyer's attention to the existing imperfections in the goods,² including a defect which impairs their utility for the intended purpose for which they are bought,³ as well as one which goes to their price-worthiness before he enters into a contract of sale with the latter.⁴ It is immaterial whether the seller knows these imperfections or not. In other words, the seller is excused from liability as against the buyer only in so far as the imperfections are known to the buyer at the time of the sale. It is self-evident that the seller's undertaking as to price-worthiness exists even where there is no bad faith on his part,⁵ unless he can show that the buyer knew the proper value of the goods before the conclusion of the contract of sale.⁶ It could be argued that the parties have impliedly agreed that the quality of the goods delivered is commensurate with the contractual price. Thus, the Code permits the buyer to cancel the sale where he has suffered gross loss which "in accordance with common usage it is not susceptible of

¹ The Code imposes the same obligation on the purchaser, that is he has an obligation to provide consideration which is commensurate with the value of thing purchased.

² See N. Katoozian, *Hoghooghé Madani "Civil Law"* (Tehran, 3rd ed. 1984) § 87, p.137

³ See the Iranian Civil Code, Article 422. For the full provisions of this Article see Appendix IV.

⁴ See the Iranian Civil Code, Article 416.

⁵ Iranian Civil Code, Art. 416.

⁶ Iranian Civil Code, Art. 418.

being overlooked."⁷ The purpose of this remedy under the Iranian Code is to compensate the purchaser against the damages, which he may have suffered as a consequence of the product's imperfections in a validly concluded contract. In other words, unlike French law, under the Iranian law, this fact that the buyer did not know the proper value of the goods purchased would not enable him to avoid the sale on the ground of mistake or vice of consent on his part.⁸

Similarly, unless otherwise stipulated by the parties in the contract, the seller is liable for a defect which impairs the utility of the property sold, even if he has acted in perfect good faith in dealing with the buyer in the sense that he did know of the defect at the time of the deal.

The implied warranties against inherent defects and priceworthiness of the goods by the seller will apply irrespective of whether the goods are new or second hand.

Although the Code has no provision to this effect, it seems that it is the intended use of the thing sold which must be impaired.⁹ Thus, an article may be lacking in certain qualities thought to be present, but if the lack of quality does not impair the intended use, the buyer cannot invoke the remedies which are available to him for a latent defect under Article 422 of the Code. Sometimes this use is clear; when it corresponds to the normal use of such goods, the seller cannot pretend to be ignorant of

⁷ Iranian Civil Code, Art. 417. For the detail of the buyer's option to cancel the sale in such instances see further, N. Katoozian, *Doreie Moghadamatiè Hoghoghè Madani "Introduction to the Civil Law"* (3rd ed. 1995 Tehran) pp. 396-409.

⁸ As will be shown later, unlike the cases where a transaction is avoided on the ground of mistake or vice of consent by either of the parties in the transaction, the buyer's right to cancel the sale under Article 417 does not have retrospective effect on the parties concerned.

⁹ The same rule is applicable under Italian, French and South African law. Article 1490 of the Italian Civil Code provides:

"A seller is bound to warrant that the thing sold is free of defects which render it unfit for the use for which it was intended or which appreciably diminish its value."

As to French law, see Colin A. et Capitant H., *Cours élémentaire de droit civil français* II (7th ed. 1932) p. 529. As to the law of South Africa, see *Mackeurtan's Sale of Goods In South Africa*, *op. cit. supra.*, note 39, part 1, chapter 1. Under the German Bürgerliches Gesetzbuch Civil Code (herein after referred to as BGB) para. 459, the goods are defective if they are unfit either for: (i) ordinary use or (ii) the particular use contemplated by the parties in the sale. In the latter situation, only if this purpose has become part of the bargain.

it. If a special use is intended, the seller is not liable for the goods' unfitness for that use, unless the buyer has advised him before the contract of the intended use.

As against those systems¹⁰ which limit the seller's liability concerning a defective product to the cases where the defects in the product are in existence at the time of the sale, Article 425 of the Iranian Code provides for the extension of his liability to cover the defects which occur after the sale, but before delivery of the property to the buyer.¹¹ Under the provisions of this Article, in other words, the goods supplied by the seller must be sound at the time of the sale and remain so until they are delivered to the buyer. Accordingly, where the contract requires the article to be transported some distance from the seller to the buyer, the former will be liable for any defect which may occur to the article before being delivered to the latter, unless he can prove that the defects were caused by the buyer himself, in which case the latter will have no recourse against the seller for the defect.¹² The advantage of this approach over the respective provisions of both common law and French law is that it relieves the buyer from the difficult question of proving that the defects were in existence at the time of the sale. Obviously, the buyer's actual knowledge of the defects in the property is a factor, which may prevent him from bringing an action against the seller for breach of the implied warranty of quality of the property. Since, in such instances, the buyer could be said to have acquired what he has contracted for. Nevertheless, unlike most other systems,¹³ Article 424 of the Iranian Civil Code does not deem him to be aware of the defects by the mere fact that the defects were

¹⁰ See, for example, the French law cases of Grenoble, 4 mars 1867, S. 67. 2. 255; Cass.-req., 8 Mars 1892, S. 95. 1. 341, in which it was held that the defect must exist at the time of the sale, or in the case of generic sales, at the time of appropriation. The South African law applies the same rule; *Mackeurtan's Sale of Goods in South Africa*, op. cit. supra., note 39, part 1, chapter 1, at p. 136.

¹¹ Iranian Civil Code, Art. 425.

¹² Iranian Civil Code, Art. 389.

¹³ For example, Article 1491 of the Italian Civil Code in part provides that the warranty against defects in the thing sold is not applicable if the defects were easily detectable at the time of the sale. Likewise, Article 460 of BGB states:

"In the absence of express warranty the vendor is under no liability for defects which the buyer could have ascertained by the exercise of reasonable care."

See further, Article 200 of the Swiss Code of obligations (Wettstein's ed. 1928)

evident where he did not realise the fact.¹⁴ In other words, the fact that the defects in the property were evident at the time of the sale does not bar the buyer from seeking recourse against the seller where he did not actually notice the defects. It could be argued that, in such instances, the contractual price between the parties is based on the understanding that the seller would supply a good article without defect. Therefore, it is unjust to allow the seller to escape from liability vis-à-vis the buyer if it later becomes apparent that the property delivered is not sound as agreed between the parties. One may reach the same conclusion by arguing that the parties impliedly agree that the goods delivered will be sound and price-worthiness. This will entitle the buyer to buyer to recourse to a remedy provided in the Code where the seller fails to deliver goods in conformity with this agreement even if the buyer examines the goods at the time of the contract, provided that the examination does not actually lead him to detect the non-conformities in the goods. The purpose of the buyer inspecting the goods is not to detect the non-conformities in the goods for which the seller will be liable, but to get to know those particulars in the goods which are of interest but for any reason have not been provided in the contract.

Accordingly, in the absence of an express agreement to the contrary, an unexercised opportunity to inspect the property by the buyer does not debar him from invoking the remedies afforded by the law for a latent defect. The same rule applies if he did not actually detect the defects by examination or inspection of the property at the time of the sale. In other words, the argument that the buyer should have reasonably noticed the defects by examination or inspection of the property before the sale appears to have no place under the Iranian legal system where he can show that such examination or inspection did not actually lead him to discover the defects. This seems to be a sound approach, which, unlike other legal systems, rightly allows the buyer to seek recourse against the seller for the defects in the property in the cases where he, despite the inspection or examination of the property, did not discover the defects before the purchase. Clearly, because it prevents the seller from hiding the defects which he knew of before entering into a transaction with the buyer, hoping that the

¹⁴ For the full provisions of this Article, see Appendix IV.

latter would not be able to detect them upon inspection of the product, and consequently, he could sell the defective product for the price of a sound one without bearing any liability against the buyer for the defects in the product. Opponents of this view may argue that this approach would overburden the seller, particularly in cases where he is in good faith in dealing with the buyer in the sense that he knows nothing about the defects in the product before entering into the deal with the latter since, in such cases, the loss sustained by the buyer is caused by his own failure to detect the defect upon inspection of the product. Therefore, the seller should take no responsibility for the defects in the property, which are discovered by the buyer after the transaction. The argument, however, does not seem to be justifiable for, in the absence of an express stipulation to the contrary by the parties, the price agreed between them is based on their mutual understanding that the property sold is not defective where they are not aware of the existence of the defects before the transaction. In other words, the price received by the seller is based on the consideration to deliver sound property and, therefore, the fact that the buyer carried out an inspection on the property before the deal should not be used as an excuse to exonerate him from the liability against the buyer for the defects if the inspection did not actually lead to detection of the defects.¹⁵ Under this view, the buyer's skills and experience will have no effect whatsoever on the extent of the seller's liability concerning the defects in the property in so far as he did not notice the defects before the sale. In other words, unlike Anglo-US law, the buyer need not show his reliance on the seller's skill or knowledge when he sues the latter for a latent defect discovered after the time of delivery.

The buyer's remedies

¹⁵ In fact, as it will be discussed later, an inspection of the goods before the sale which did not lead to discovery of the defect in the goods by the buyer not only would not deprive him from invoking of the remedies afforded by the law for an inherent defect, but also it enables him under Article 413 of the Code to sue the seller for non-conformity of the goods with the quality which they possessed at the time of the inspection if the purchase is based on his previous inspection.

Article 422 of the Iranian Code provides the remedies available to the buyer where the thing purchased is defective. According to this Article:

“If after the transaction it transpires that the property was defective [before being delivered by the seller], the buyer has the option either to keep the property and ask for compensation for its defects, or to cancel the transaction.”

Under these provisions the choice of one action or the other is entirely in the buyer,¹⁶ when latent defects render the property unfit for use, or when they impair the use to such extent that he would not have acquired the property if he had known of them. This option in the buyer continues until one remedy or the other has been obtained; until that time, the buyer may shift from one to another.

The same remedy is available to the buyer even if only some of the several things sold are defective, that is; he may either cancel the sale altogether or keep the whole things and ask the seller to compensate him for the defect. But he cannot retain the sound part of the things and withdraw the sale or apply for compensation for their defective part, unless the price of each one of them is fixed separately in the sale or the seller gives his consent to discrimination of the things by the buyer.¹⁷

Unlike French law, which does not allow the buyer to act unilaterally but requires him to apply to the court to rescind the sale for redhibitory defects,¹⁸ under the Islamic and Iranian law the existence of several “options”, including the ‘Option of Defect’, allows the buyer to cancel the sale with the seller at his option without need to resort to the court.

Nevertheless, the aggrieved buyer who chooses to cancel the contract must be able to return the goods and their attachments to the seller in the same condition as the latter delivered them to him. This means that buyer will lose the option to cancel the sale and, therefore, may only claim compensation vis-à-vis the seller for the defects in the property where he fails to observe this requirement. Accordingly,

¹⁶ Accord: Art. 205, Swiss Code of Obligations; Arts. 462, 465, 466, BGB; Art. 1644, French Civil Code; Art. 2208, Argentine Civil Code. Considerable doubt seems to exist as to availability of this option of actions to the buyer under the South African law. See Morice, *Sale in Roman-Dutch Law* (1919) at pp. 145-148; *Mackeurtan's Sale of Goods in South Africa*, *op. cit. supra.*, note 39, part 1, chapter 1, at pp. 136-137.

¹⁷ Iranian Civil Code, Article 43.

¹⁸ Amos & Walton's *“Introduction to French Law”* (3rd. ed., edited by F. H. Lawson, A. E. Anton,

Article 429(2) states that the purchaser can only claim compensation where the defective goods sold have been changed.¹⁹ It is immaterial whether the changes in the goods are caused by the buyer's action or not. Similarly, the buyer may only seek compensation from the seller for the defects if the goods are destroyed when they are in his (i.e., the buyer's) possession; or if they are passed to a third party by him after the sale.²⁰ Moreover, the buyer is not entitled to return the goods purchased to the seller by cancelling the sale with the latter if after the time of delivery another defect occurs in the goods.²¹ The new defect, however, will be no impediment to the buyer's right in cancelling of sale and returning the goods to the seller if it occurred during the time when the buyer has his special option,²² or if it is resulted from the former defects which existed in the goods before the time of delivery.²³

The defect may exist in the thing sold or in its accessories, and where a number of things are sold, the defect may exist in one or more. Obviously, the buyer may invoke any of the remedies afforded by the law for a hidden defect where the thing sold can be divided into the principal thing and its accessories, and the defect appears in the principal. The question, however, arises as to whether these remedies are also available to him where the defect is in the accessory. According to Article 356 of the Code, the accessory is considered as part of the thing sold and, therefore, it becomes the property of the buyer upon the sale. On this basis, one may argue that the buyer may also avail himself of either of the remedies under Article 422, namely cancellation of the sale or reduction of the price, for an inherent defect in the accessory particularly if the defective accessory, impairs the utility of the principal.²⁴

and L. N. Brown, Oxford: Clarendon Press, 1967) pp.187-9.

¹⁹ For example, the buyer cannot cancel the sale where the object of the sale is some leather, which has been used by him in making shoes.

²⁰ Iranian Civil Code, Art. 429(1).

²¹ *Ibid.*, Art. 429(3).

²² *Ibid.* It is to be noted that Article 396 of the Iranian Civil Code provides several options which, dependant on the circumstances of each case, give to either the seller or the buyer a right to cancel a validly concluded transaction between themselves.

²³ *Ibid.*, Art. 430.

²⁴ The Roman law granted no remedy to the buyer for a latent defect in an accessory unless the accessory was mentioned and sold separately. See Moyle, J.B., *The Contract of Sale in Civil Law: with references to the laws of England, Scotland and France* (Oxford : Clarendon Press, 1892) at p. 199. This rule has been followed by the South African law. See *Mackeurtan's Sale of Goods In South Africa, op. cit. supra.*, note 39, part 1, chapter 1, at p. 139.

Nevertheless, in the absence of an express agreement to the contrary, it seems appropriate not to allow the buyer to resort to the remedy of cancellation of the sale when the defect in the accessory has no substantial affect on the utility of the principal specially, since the Code does not regard an accessory to be so important in the contract as its principal. As an example, Article 342 states that in a contract of sale the quantity, type and nature of the goods must be known to the parties concerned otherwise the sale would be void for there is strong possibility that one of the parties may sustain loss if the requirement of this article is not met, while under Article 356, the existence of the accessory may even be unknown to the parties at the time when they make a valid contract.

The effect of cancellation of the transaction by the buyer is to restore the ownership of the goods to the seller. The buyer must return the goods to the seller after cancellation of the transaction before he can claim back the price from the latter. The Code does not clarify the consequences of the seller's refusal to accept the property redelivered to him by the buyer after cancellation of the transaction between the parties. Article 273 of the Code, which concerns performance of an obligation by a party states that:

“If a party entitled to receive payment of a debt refuses such payment, the obligor can obtain discharge by making payment to a judge or his substitute in which case he will thereafter have no liability for any damage in respect of the object of the undertaking.”

By analogy to the provisions of this Article, it may be said that in the case of the seller's refusal to receive the goods which are returned to him by the buyer after cancellation of the sale, the latter must deliver the goods to a judge or his substitute if he wishes to claim back the purchase price from the seller.

In contrast with both Roman ²⁵ and French law²⁶ concept of resolution or rescission of the contract, cancellation of the sale under Iranian law does not have

²⁵ See D., 21. 1. 43. 8; 21. 1. 21. 1; Moyle, J.B., *The Contract of Sale in Civil Law: with references to the laws of England, Scotland and France* (Oxford: Clarendon Press, 1892) 204.

²⁶ See Morrow, “Warranty of Quality: a Comparative survey” (1940) 14 *Tulane Law Review* 529, 536; Colin A. et Capitant H., *Cours élémentaire de droit civil français* II (7th éd. 1932) n° 580, p. 532. Like French law, Article 205 (1) of the Swiss Code of Obligations permits the buyer to sue the seller for rescission of the sale in the case of breach of the implied warranty against latent defects (the *actio*

retrospective effect on the parties concerned. This means that the buyer has no liability to return to the seller fruits or profits which he derived from the property after the sale and before its cancellation, as he is not entitled to sue the seller for the cost incurred by him in keeping the property or for the profit which the latter obtained from the price during this period of time.

Article 427 of the Code spells out the methods upon which compensation for the defect in the goods sold is to be calculated in cases where the buyer chooses to receive compensation rather than to cancel the sale. According to this article:

“The true price of the property sold, in undamaged state and its true price in damaged state will be determined by experts.²⁷

If the [true] price of the property in undamaged state be equal to the purchase price as fixed between the parties at the time of the sale, the difference between this price and the [true] price of the property in its damaged state will be the amount of the compensation.

And if the [true] price of the property sold in undamaged state is less or greater than purchase price, the proportion which the [true] price of the property in the damaged state bears to its [true] price in undamaged state will be calculated, and the seller will retain that proportion of the sale price, and will return back the rest as the compensation to the buyer.”

Should the experts disagree, the average of the prices determined by them is considered as the authoritative price for the purpose calculating of the compensation for the defects in the property sold.²⁸

Article 435 of the Code requires the buyer to exercise the “option of defect”²⁹ immediately after discovery of the inherent defects.³⁰ Nonetheless, the parties may modify this time limit by agreement.³¹

redhibitoria) if he so wishes. According to Article 208(1) of this Code, the buyer, in the case of rescission must return the goods and the benefits therefrom to the seller in exchange for return of the purchase price. Following Articles 208(2) and 208(3) of the Code of Obligation, the seller has, further, an obligation to refund the buyer any interest accrued from the price together with the cost of legal action and all of related expenses. Similarly he is bound to compensate the latter for damages directly resulting to the him following the delivery of the defective goods (Art. 208(2) of the Swiss Code of Obligations). Finally, in the cases where the seller was negligent he must also reimburse the buyer for any indirect damage caused to him by the defective goods. There is, however, a presumption of negligence which can be overcome by opposing evidence from the seller (Art. 208(3) of the Swiss Code of Obligations).

²⁷ Special officers of the court who act as appraisers

²⁸ Iranian Civil Law, Art. 428.

²⁹ The buyer's option either to cancel the sale or to accept the goods and ask for compensation for the damage under the Iranian Civil Code is regarded as the “Option of defect”.

³⁰ It is to be noted, however, that, unlike the other systems, the Iranian Civil Code does not recognise

The aggrieved buyer who fails to observe the time limit is considered to have waived his option to cancel the deal or to receive compensation for the defects in the property sold, and he will no longer be able to sue the seller for the defects.³²

However, Article 435 of the Code's time limit does not bar the buyer from suing the seller for cancelling of the sale if it is later discovered that the latter wilfully deceived him through, for example, deceptive concealment of the defects in the property sold. Since Article 439 of the Code³³ expressly states that the buyer in the case of fraud or trickery (*tadlis*) by the seller has a right to cancel the sale and recover the price paid to the latter.³⁴ In addition, in such instances, the buyer may also sue the seller for any damages which he sustained as a result of the delivery of defective property by the latter.³⁵

Moreover, the time limit does not affect the buyer's right to seek recovery of the purchase price from the seller if he can show that because of the defects, the goods sold have in actual fact no proprietary worth and no price. For under Article 434 of the Code, in such instances, the transaction between the parties is void *ab initio* and thereby the buyer may recover the purchase price together with all fruits or profits which the seller may have derived from the price.³⁶ As an example, suppose the

any specific period of prescription for an action for the redhibitory actions and the action *quantum minoris*. That is the buyer may bring any of these actions against the seller whenever he discovers a latent defect in the subject matter of the sale.

³¹ See Iranian Civil Code, Article 10.

³² Similarly, under Arts. 201(2) and 201(3) of the Swiss Code of Obligation the buyer will lose his rights under the warranty where he fails to notify the seller of the hidden defects immediately after discovery. However, lack of notice or belated notice does not affect the seller's liability concerning the latent defects in the goods where he wilfully deceives the buyer (e.g., in the case of deceptive concealment of a defect). For similar provisions under the laws of Denmark, Finland, Iceland, Norway and Sweden see FR. Vinding Kruse, *A Nordic Draft Code* (Else Giersing translation 1963 Copenhagen), Articles 918(1) & (2).

³³ Iranian Civil Code, Art. 439.

³⁴ For further discussion concerning the Option of Lesion see Katoozian, *op. cit. supra*, note 2 at pp. 35-36, 182; Amin, S. H., *Commercial Law of Iran*, (Tehran 1364H/1986 AD) pp. 59-60; S. H. Emami, *Hoghooghé Madani "Civil Law"*, (Tehran, 8th ed. 1368 H.Sh.; 1989), vol. 1, pp. 514-516; N. Katoozian, *Doreie Moghadamaté Hoghooghé Madani "Introduction to the Civil Law"*, (Tehran, 3rd ed. 1995) pp. 396-409.

³⁵ See Iranian Civil Code, Article 331.

See also Katoozian, *op. cit. supra*, note 2 § 134 p. 202.

³⁶ It is to be noted that under the Iranian system the purchase price may be money or, unlike the common law, any other property which is given by the buyer in consideration of the goods sold. See Katoozian, *op. cit., supra*, note 2, § 49, p. 84. Therefore, the question as to whether the transaction is a sale or a barter very much depends on the intention of the parties concerned. Where they exchange

buyer purchases a computer set on the basis of his previous inspection, but after its delivery he discovers that because of an accident before the sale the computer is broken down in a way that it had no proprietary worth at the time of the sale. In this case, the sale between the parties is void *ab initio* and the purchaser under Article 265 of the Code has a right to recover from the seller the price and the fruits and the profits which the latter derived from the price. The buyer's right to recover the fruits and the profits which the seller has derived from the goods is based on the principle of unjust enrichment. Since, the property in the goods did not pass to the seller in the cases where the transaction is void and therefore, he has no right over the fruits or profits derived by him from the goods after the sale. If part of the goods sold is proved to be worthless, then the sale in respect of that part is void and the buyer under the "Option of Sales Unfulfilled in part" (*khiare tbaoze safgheh*) may keep the sound part of the goods and claim back the consideration for the defective part, or to cancel the sale altogether and to sue the seller for the whole consideration.³⁷ In the latter case, the buyer may also recover any benefit which the seller has derived from the consideration concerning the defective part of the goods. He may, further, require the seller to pay compensation for the expenses, which he has incurred for keeping of this part of the goods.

Similarly, if the buyer can show that although the goods were not worthless at the time of the sale, the defects in them caused them to lose all their value before being delivered to him, the transaction between the parties is regarded as cancelled automatically from the time of the loss of value in which case the buyer may claim back the purchase price under Article 387 of the Code.³⁸

Finally, as pointed out earlier, under Article 416 of the Code, the quality of the goods sold must be commensurate with the contractual price agreed between the parties concerned. Unlike Anglo-US law, this allows the buyer who has sustained gross loss in dealing with the seller to cancel the transaction with the latter (the

two things with each other without defining which of them is price the transaction is barter which is the subject of general rules of contracts, but if they regard one of the things as the price of the other the specific regulations of a sale will apply to their transaction.

³⁷ Iranian Civil Code, Article 434.

³⁸ For the full provisions of this Article, see Appendix IV.

Option of Lesion), even if the property delivered does not suffer from a defect that impairs its intended utility. The buyer does not lose his right of cancellation of the sale under this Article by the seller's offer to refund him the difference in price, unless the buyer agrees to receive the difference in price.³⁹ As to the defects in the property, this means that the buyer may cancel the sale even if, for one reason or the another, he has lost his right under the "Option of Defect" (*aib*) if he can show that the defects render the property sold unpriceworthy.

The Code does not clarify whether, in the case of latent defects, the buyer can require the seller to repair the goods sold where they are repairable. However, as pointed out earlier, it could be argued that the seller has impliedly undertaken by the sale that the property sold would be free from any latent defects which might impair its utility. Under the Islamic general principle of *ufu bil uqud* (honour your contracts),⁴⁰ the seller has an obligation to provide property in conformity with the terms of his agreement with the buyer. Where the seller in breach of this obligation delivers a defective article, the buyer, as his primary remedy, should be able to require him to have it repaired where it is reasonable to do so. Shikh Morteza Ansari as a prominent Islamic scholar supports this view.⁴¹ In his book, which is the most authoritative legal treatise on Islamic commercial law, he favours specific performance as a primarily remedy for breach of a contract. According to him, the option to terminate the contract or apply for a damage on the ground of the breach of an obligation by the aggrieved party is available only if it is not practical to force his counterpart to comply with the terms of the contract. He bases his view on the notion of sanctity of contract in Islam as referred to in the First Verse of Fifth Chapter of Koran which addresses the believers and states: "*ufu bil auqud*" (keep faith with your contracts). Nevertheless, he argues that the creditor will lose his right to demand specific performance where such a demand is unreasonable in the sense that it inflicts

³⁹ Iranian Civil Code, Art. 421.

For detail of the Option of loss, see S. H. Emami, *Hoghooghé Madani "Civil Law"*, (8th ed. 1368 H.Sh.; 1989, Tehran), vol. 1, pp. 496-500; see also, A. M. Helli, *Sharaeol Islam* (2nd ed. Edited by A. M. Ali 1983 Beirut) vol. 2, p. 22.

⁴⁰ See the 1st Verse of the Fifth Chapter of the Koran (The Nourishment) which states: "*ufu bil auqud*" (keep faith with your contracts).

⁴¹ See Ansari, M., *Makasib*, (Isfahan, 1305H/1887, edited by Mulla Hussein Khorasani) pp. 283ff.

against the party in breach a greater loss than the loss suffered by the creditor. To justify the argument he refers to the Islamic principle of *la darar* (no harm) and states that in such cases the principle of *iza ta'araza tasagata* (any two contradictory pieces of evidence invalidate each other) would impede the creditor to apply for specific performance.

For the same reason, the buyer may, as an alternative remedy, demand that the seller replace the defective article delivered with a sound one, where the subject matter of the sale is of a general nature as opposed to a sale of specified goods, since in the former case, the seller has an option to select an article from various units in conformity with the contractual terms. Accordingly, the law does not consider him to have performed the contract by appropriating a defective article to the sale. The Code, in fact, considers the seller has failed to perform his obligations undertaken under the contract where the article delivered is defective. And, therefore, the buyer may as his remedy demand him (i.e., the seller) to replace the defective article, under Article 279.⁴² On the other hand, where the parties are agreed on a sale of specified goods, the seller performs the contract, though defectively, by delivering the said goods to the buyer, even though the latter may cancel the sale or receive compensation from the seller on the ground of latent defects in the goods.

As mentioned earlier, the seller's liability as to the latent defects under Iranian law does not depend on whether or not he was ignorant of their existence at the time of the transaction, though he is in worse case if he knew of them and dishonestly withheld his knowledge from the buyer, for, then, in addition to his liability against the buyer under Article 422 of the Code, he is also liable under Article 331 to make good to the latter any loss which he may have sustained through making the contract even if this loss was not predictable to the parties at the time of the contract. Nonetheless, the seller's liability vis-à-vis the buyer, under Article 331, is delictual rather than contractual. That is, the seller will have to bear no responsibility whatsoever against the latter for possible injuries or damages caused to the buyer by the delivery of defective property where the latter has no evidence to prove the

⁴² Iranian Civil Code, Article 279.

seller's negligence in dealing with him. This approach, however, suffers of various flaws. First, as pointed out earlier, the price in a contract is set on the understanding by the parties that the goods delivered are not defective. This means that the seller by entering into the contract impliedly undertakes to provide the buyer with a safe and sound article. Clearly, he is in breach of the contract where the article appears to be defective and, consequently, must under the principle of *la darar* (no harm) bear responsibility for all damages which the defects inflicted to the buyer.⁴³ Further, it is both unjust and unreasonable to allow the seller who has received the price for sound goods to escape from liability where it transpires that they are defective and that the defects in them have caused damages to the buyer simply because the latter is unable to prove his fault in the deal. In fact, the breach of the contract by the seller to provide safe and sound property to the buyer is in itself a fault committed by the former which allows the latter to sue him for damages caused by the defects on delictual ground.⁴⁴ Equally, under the Islamic principle of *Man lahol ghonm faalaihel ghorm* (one who set to benefit from something must also bear all responsibility arising from it), the seller is the only person who benefits from selling the property, and, therefore, he should also bear all consequences of its defects if it is discovered to be defective at the time of delivery.

Express warranty under the Iranian law

Pre-contractual misrepresentations

The Iranian Civil Code does not specifically deal with the issue of pre-contractual misrepresentation made by the seller concerning the quality of the goods sold. The dominant view seems to be that the seller has no liability with regard to pre-contract

⁴³ See Ansari, *op. cit. supra.*, note 42, pp. 252-53. See also Article 727 of the Iranian Civil Procedure Code which states that the aggrieved party may apply for compensation from his counterpart for loss resulting from non-performance or delay in performance of the contract by the latter. According to Article 728 of this Code the damages are to be assessed by the court and should include pecuniary loss as well as loss of profit which have directly resulted from the breach of the contract.

⁴⁴ See Iranian Civil Code Arts. 226-30. See further Katoozian, *supra.*, note 2, pp. 206-6.

negotiations, in so far as they did not become part of the terms of the contract between the parties. Nevertheless, Article 439 of the Code states that the buyer in the case of fraud or trickery (*tadlis*) by the seller has the right to cancel the transaction with him. Under this Article, the seller is liable to the buyer if the latter can establish that specifications or/and descriptions of the goods in the former's pre-contractual statements misled him. This liability, however, is limited to the cases where the seller has actively deceived the buyer by misrepresenting the property before making the transaction with him. In other words, the seller would have no liability vis-à-vis the buyer in the cases of innocent misrepresentation, or where his misrepresentation did not actually mislead the latter in purchasing the property.

A question, however, arises as whether or not the seller is liable for delivering goods which do not conform with specifications or/and descriptions contained in his advertisements or manuals which were unknown to the buyer at the time of the sale. In such instances, the buyer's ignorance of the existence of the misrepresentation concerning the quality of the goods before the sale would bar him from cancelling the transaction under the option of fraud or trickery (*tadlis*), since the misrepresentation did not cause the buyer to be misled as required by Article 439 of the Code. Moreover, the seller may argue that his misrepresentation does not constitute part of the transaction between the parties since it was not known to the buyer at the time of the transaction and, therefore, he should bear no liability for the damages caused to the latter by the misrepresentation. It seems, however, that these arguments are not tenable since, as Professor Katoozian points out, in every contract of sale the seller impliedly undertakes to provide the buyer with adequate information on the condition of the goods and precautions that must be taken concerning the use of the goods as he is bound to warn the latter about the possible dangers of the goods and the risk incidental to their use.⁴⁵ In other words, the seller is in breach of the contract and thereupon liable against the buyer if it transpires that the descriptions or specifications given in his advertisements or manuals are incorrect even if the latter was ignorant of their existence at the time the sale. Moreover, the

⁴⁵ Katoozian, *op. cit.*, *supra.*, note 2 at p. 213.

seller is the only person who takes benefit of an advertisement or a manual by persuading the public to purchase their products and, therefore, he should under the maxim of *man lahol ghonm fa alaihel ghorm* accept its consequences where it turns out to be incorrect. Finally, as pointed out earlier, all the expenses sustained by the seller in respect of a pre-contractual advertisement are taken into account in setting the contract price with the buyer. Therefore, it is unjust under the general principle of *la darar* (no harm) to allow the seller to avoid his liability for the damages inflicted on the buyer by his misrepresentation as to quality of the goods in the advertisement on the ground that the latter did not know about it at the time of the deal. It is immaterial whether he was *bona fide* in dealing with the buyer in the sense that he was unaware that his representations about the goods were incorrect. This means that, unless otherwise stipulated in the contract, the seller should be held liable for the damages caused to the buyer by his pre-contract representations concerning the product's quality, even if he was innocent in making of the representations.⁴⁶

If this argument is correct, then the seller's liability as to the statements or representations made before the sale is contractual and, as such, it is, unlike non-Islamic systems, not subject to a limitation period under Iranian law.⁴⁷ In other words, the seller is liable for breach of the contract if the goods delivered do not conform with his pre-contractual statements or representations as to the goods' quality.

Contractual warranties relating to the quality of the goods

⁴⁶ For the same provisions see Article 1602 of the Luxembourg Civil Code under which the seller is contractually bound to explain to the purchaser clearly what his obligations will be under the contract of sale. An obscure or ambiguous agreement will be construed against the seller. Similarly, section 18 of the Norwegian Purchase Act (Kjopsloven) (Act 27 of 13 May 1988, governing the sale of goods) states that the seller is liable against the buyer if he fails to deliver goods which correspond to the statements which he made in his publicity materials or elsewhere which can be assumed to have exerted an influence on the latter.

⁴⁷ It is to be noted that, in compliance with the Islamic principle under which a person should not be deprived of pursuing his right by passage of time, the law relating to the prescriptive period has been generally abolished by the Iranian law after the Islamic revolution in 1979.

Apart from the implied warranty outlined above, the parties may provide by the contract that the goods sold will have a specific character, in which case the seller is liable if the goods delivered do not correspond to the contractual provisions. Like Roman law, the Iranian Code extends this liability to cover not only expressly promissory words (*promissa*) made by the seller, but also his representations or even descriptions of the goods in the contract (*dicta*). It is not material whether these representations or descriptions are made before the sale or after it. In the latter case, the statements and the representations by the seller are considered as an amendment of the contract of sale if the buyer accepts it and, unlike English law, it need not be supported by a consideration on the part of the latter.

Article 235⁴⁸ of the Civil Code grants the buyer the right to terminate the transaction where the goods delivered do not conform with the seller's promissory words concerning their quality in the contract. Nonetheless, this article does not clarify whether and how the buyer's knowledge about the goods would affect the seller's liability concerning the express warranty made by his promissory words. Similarly, the article gives no answer to the question of whether the buyer's inspection of the goods before the transaction has any effect on the extent of the seller's liability in failing to fulfil his contractual promissory words with regard to the quality of the object of the sale. It may be argued, in the former case, that the buyer's knowledge would impede his right of cancellation of the sale under Article 235 for non-conformity of the goods with the condition of description made by the seller, since the quality of the goods received by the buyer is in conformity with his expectation in the contract. In other words, he did not expect to receive the goods with a quality other than what he knew before the sale. The argument, however, does not seem to be tenable, since there are instances in which the buyer may, despite his previous knowledge of the goods' quality, expect the goods be in conformity with the contractual terms. This is the case, for example, where there is a long interval period between the time of acquiring knowledge by the buyer and the time of the sale, during which there is a strong possibility that the quality of the goods is substantially

⁴⁸ For the full provisions of Article 235 of the Iranian Code, see Appendix IV.

altered before being sold by the seller. Consequently, the former may reasonably expect that the goods delivered would be in accordance with the express warranty given by the seller in the contract. Moreover, this warranty is one of the main factors which would have a substantial effect on the parties' decision in setting the amount of the contractual price between themselves. In other words, part of the price is impliedly set as a consideration for the express warranty made by the seller in the contract of sale and therefore, it is unreasonable to allow him to escape from the liability for non-conformity of the goods with the express warranty by arguing that the buyer either knew the goods' non-conformity or he should have known it upon his inspection of the goods before the sale. Under this approach, it is the duty of the seller to ensure that the quality of the goods would be in accordance with the express warranty made by him before entering into the deal.⁴⁹ Of course, the seller may exclude his liability concerning non-conformity of the property with its description in the contract (*dicta*) by expressly providing that the description is made merely for the purpose of the buyer's information and it does not constitute an express warranty against him. In such instances, the buyer would have no remedy against the seller for the property's non-conformity which he knew or should have been known to him upon its testing before entering into the deal with the latter. These regulations, however, do not apply to the seller's promissory words concerning the product's quality (*promisa*), since it is absurd to allow the seller, on the one hand, to take benefit of his promissory words as to the quality of the product by increasing of the price in the transaction and, on the other hand, to exclude his liability for the breach of the express warranties made by these promissory words.

It seems, however, that this approach has not been adopted by the Code, in so far as the express warranty is created by descriptions of the product in the sale. On this basis, Article 410 of the Code states:

“A buyer who purchases an article by description *only without having seen it*⁵⁰, has the option of either cancelling the transaction or accepting the article as it is

⁴⁹ Nevertheless, Article 232(1) of the Code relieves the seller from the liability arising from the condition of description as to the quality of the goods if the condition is proved to be impossible to fulfil.

⁵⁰ Italics added.

if upon inspection after the sale he discovers that the article does not possess the description which the seller made in the transaction.”⁵¹

According to the provisions of this Article, in other words, the buyer would lose his remedy of cancelling the sale for non-conformity of the goods with a description made by the seller in respect of their quality where he inspects them before entering into the deal with the latter. Nevertheless, it is unclear whether he will also lose his right to cancel the transaction where the seller gives him an opportunity to examine the goods but he fails to carry out the examination before their purchase. It might be argued that in the case of inspection, the buyer will directly acquire knowledge concerning the quality of goods at the time of inspection and, therefore, in his dealing with the seller, he does not rely on the information given by the latter through description of the goods in the contract. One might, further, argue that, in the case of un-exercised opportunity of inspection, the cause of damage sustained by the buyer for non-conformity of the goods with the contractual descriptions is his own failure to carry out an inspection of the goods and, therefore, he should have no recourse against the seller for the damage caused by his own failure. The argument of reliance, however, is hardly justifiable since there is no reason why the buyer, in dealing with the seller, cannot rely both on his own knowledge, which he acquires by examination of the goods, and on the information provided by the seller through descriptions of them in the contract. This policy allows the buyer to avail himself of the remedies afforded by the law for non-conformity of the product's quality with both the description made by the seller and/or the description which he directly acquired by inspecting the product before the sale. In other words, the inspection of the property by the buyer before the sale not only does not preclude him from cancelling the sale, if the property does not possess the quality represented by the seller's description in the sale, but also it enables him to sue the latter under Article 413 for non-conformity of the product's quality with the descriptions which he acquired by the inspection.⁵²

⁵¹ On the other hand, under Article 411 of the Civil Code, only the seller will have the right to cancel the sale if he has not seen the property sold whereas the buyer has seen it and it transpires that the property possesses qualities which are other than those described in the sale.

⁵² Nonetheless, it could be argued that the sale between the parties is void under Article 342 where there is a conflict between these two sets of descriptions, since it is not clear what is the exact nature of the product which is to be delivered by the seller (*moamelehe gharary*). See Katoozian, *op. cit.*

Moreover, as pointed out earlier, the buyer has already paid for the express warranty arising from the descriptions of the goods in the sale and there is no reasonable ground to prevent him from having a recourse against the seller for non-conformity of the goods with the warranty, even if he was not aware of the warranty prior to completing the sale, since, under the principle of *man lahol ghone faalihel ghorm* (a person who stands to gain from something must also accept any responsibility arising from it), the seller, by being paid for the description, is to assume liability against the buyer if the goods do not possess the qualities represented by the description.

The fact that the quality of the goods may be altered during the time between their inspection and the sale has been recognised by Article 413 of the Iranian Code, under which the buyer is entitled to cancel the bargain if he discovers that the property does not possess the qualities which it had at the time of the transaction and which became the basis of the bargain between the parties. Nonetheless, this article does not consider the situation where the buyer relies both on his previous inspection and on the information given by the seller through a description of the property in the sale. Similarly, the article does not clarify the buyer's legal position as to the quality of the property purchased if in the latter case there is a conflict between the descriptions of the property which he discovered by his previous inspection and those which were provided by the seller in the contract. It appears that in such circumstances the property delivered should conform both with the descriptions which were discovered by the buyer's previous inspection and became part of the basis of the sale and with the descriptions made by the seller where there are no conflict between these two group of descriptions, otherwise the former descriptions should be considered to have been altered or modified by the descriptions which the seller later provided in the contract.

According to Article 412 of the Code, in the instances where the buyer has inspected only a portion of the goods, while purchasing the rest from description or by way of samples, he shall have the option either to reject all the goods or accept

note 2 § 55 p. 89. For the full provisions of According to Article 342 of the Iranian Code, see

them all if he later discovers that the remaining portion of the goods is not in conformity with the contractual description or sample. In other words, in such instances, the buyer cannot discriminate between the different portions of the goods by keeping the portion which was inspected by him before the sale, while rejecting the other portion which is not in accordance with the description or sample provided by the seller. For under Article 441, the buyer may avail himself of this remedy (i.e., *khiare tabaoze safgheh*) only if the transaction, in respect of a part of the goods sold is void for any reason,⁵³ whereas the transaction, in the foregoing case, is valid but the buyer has a recourse against the seller for non-conformity of a portion of the goods with the description.

Nonetheless, this rule applies only to the cases where the description of the article sold is a collateral part of the transaction between the parties, otherwise the transaction between the parties is void *ab initio*, under Article 353 of the Code, if the description was essential for the parties concerned in making the transaction and the article does not conform with the description. This is because, in the latter case, the parties intended to sell something different from the thing which was actually delivered to the purchaser, therefore, the transaction under the Islamic principle of *ma ghasad lam yagha va ma vaghaa lam yaghsed* (what was intended did not happen and what happened was not intended) is void. In such cases, if only part of the chattel sold is not in accordance with the contractual description, then the transaction only with regard to that part is void and the buyer under the "Option of Sales Unfulfilled in part" (*tabaoze safgheh*) is entitled either to retain the other part of the chattel which conforms with the description, whilst returning the consideration of that part in respect of which the transaction is void, or to cancel the remainder of the deal.⁵⁴

It must, however, be remembered that the foregoing provisions do not cover a contract for the sale of unascertained or future goods by description. Unlike the sale of a specific thing, in such instances the buyer's remedy for non-conformity of the product delivered by the seller is not to cancel the sale but to sue the latter for

Appendix IV.

⁵³ For the detail of this option of the buyer (i.e., *khiare tabaoze safgheh*) see Katoozian, *op. cit.*, *supra.*, note 7, p.436-446.

replacement of the product with another product which complies with the contractual description.⁵⁵ Since, as mentioned earlier, the effect of cancelling the sale by the buyer is to reverse the title which has passed to him by the sale to the seller, whereas in such instances the buyer acquires no title by the contract of sale in order to reverse it to the latter. In other words, the seller in a sale of merchandise of a general description is not regarded to have performed his contract with the buyer by delivering goods which do not conform with the express warranty created by his descriptions in the contract. Therefore, the buyer may, in such instances, demand the seller replace the goods or to repair them so as to make them in conformity with the express warranty provided in the sale.

In the case of the seller's refusal to replace or to repair the non-conforming goods, the buyer may ask the court to compel him to do so. Of course, if, despite the court's order, the seller resists performing his obligation by replacing or repairing the non-conforming goods, the buyer may cancel the sale and demand compensation for the loss caused by the seller's breach.

The seller's liability against a sub-purchaser concerning the quality of the goods

Like English law, the Iranian system does not recognise the French legal theory that following resale of the goods by the buyer, all the rights which were conferred upon him by the original sale will be transmitted automatically to the sub-buyer. Under Article 231 of the Iranian Code, an undertaking or a transaction is "only binding on the two parties concerned except in the cases coming under Article 196." Article 196 states:

"Unless otherwise stated in a contract or unless subsequent evidence to the contrary is established a person who enters into the contract is deemed to be acting for himself, nevertheless, he may agree to undertake an obligation in the contract for the benefit of a third party."

⁵⁴ Iranian Civil Code, Article 353.

⁵⁵ Iranian Civil Code, Article 414.

According to the provisions of the foregoing articles, unless otherwise expressly undertaken by the seller, the original sale between him and the buyer confers no right to the sub-buyer as against the seller for breach of a warranty. Similarly, resale of the defective goods by the buyer to the sub-buyer creates no obligation whatsoever, against the original seller for the defects. In other words, 'lack of privity' of contract between the seller and the sub-buyer, under Iranian law, prevents the latter from bringing a suit against the seller for the product's inherent defects or/and for its non-conformity with the descriptions provided by the former in the original sale.⁵⁶

The argument of "lack of privity" should not, however, deprive the sub-buyer from recovering compensation from the seller for breach of a warranty concerning the quality of the product in the original sale particularly in the case of implied warranty against inherent defect and where the express warranty arises from an advertisement made by the seller or a brochure provided by him to the buyer, since the main purpose of the seller in providing the warranty in such cases is to increase the sale of his product to the public of which the sub-buyer is a member. It may be said that the seller's warranty as to the quality of the product in these cases is in fact an offer to the public which binds him against anybody who purchases the product, irrespective of whether the latter purchases the product directly from him (i.e. the seller) or from an intermediary (i.e. the original buyer). Therefore, the allegation that no privity exists between the seller and the sub-buyer is incorrect, even though the former did not directly sell the goods to the sub-buyer. Moreover, in such instances, the seller is a man who, in the final analysis, will gain most from the warranties concerning the quality of product through which the public including the sub-buyer as one of its member is induced, at least partly, to purchase more of the seller's product. Consequently, under the general principle of *man lahol ghom fa alaihel ghom*, the law should hold him responsible against the latter where the product is not in accordance with the warranty. Moreover, allowing a sub-buyer to sue directly the original seller for breach of a warranty not only would save the parties both time and expense but also it would diminish the amount of litigation in the courts.

⁵⁶ Nonetheless, the sub-buyer may recover from the seller in tort, if the latter's fault can be

It seems, however, that there is no legal ground for the application of this approach to express warranties other than those mentioned above, namely the warranties arising from the seller's statements, which are not directly addressed to the public. This means that a sub-buyer cannot sue the original seller for a breach of an express warranty arising from a statement not directly addressed to the public. Nonetheless, under Article 196 of the Iranian Code, the parties to a contract may agree on an extension of the seller's liability concerning the breach of an express warranty against a sub-buyer who would subsequently purchase the goods from the buyer.

Exclusion of the seller's responsibility concerning the quality of the goods

Article 448 of the Iranian Code allows the seller to contract out of his obligation concerning the quality of the goods sold.⁵⁷ This means that he will have no liability to the buyer for an inherent defect or for non-conformity of the merchandise with its contractual descriptions where he sells it 'as it stands' or 'with all faults'. Nonetheless, a mere inspection of the goods, even by an expert before the sale does not relieve the seller from his liability against the latter for a latent defect if the defect is not actually discovered by the inspection or if the defect in the goods occurs during

established.

⁵⁷ Iranian Civil Code, Art. 448. It is to be noted that the Iranian Civil Code provides several Options which, depending on the circumstances of each case, give rise to the right to either of the aggrieved parties to cancel his violable contract with the other. This Options have been enumerated by Article 396 as follows:

- “ 1. The Option of Meeting-place.
2. The Option of animals.
3. The Option of Conditions.
4. The Option of Delayed payment of the price.
5. The Option of Inspection and Incorrect Description.
6. The Option of Lesion.
7. The Option of defect.
8. The Option of Fraud (trickery).
9. The Option of Sales Unfulfilled in part.
10. The Option of Unfulfilled conditions.”

the time after the sale and before their delivery or/and for their non-conformity with the descriptions provided by the parties in the sale.

The main difference between English and US law, on the one hand, and Iranian law, on the other hand, is that, under the former systems, an offer granted to the buyer to examine the goods will exclude the seller's liability concerning defects which should have been reasonably discovered by such an examination even if the buyer has failed to examine the goods, whereas, under Iranian law, such an examination has no effect whatsoever on the seller's liability if it did not lead the buyer to actually discover the defects, even if they were evident at the time of examination but the buyer did not realise the fact⁵⁸

It is unclear whether the seller's liability as to an inherent defect could be excluded by a non-warranty clause in the contract where he knows the existence of the defect and deliberately remains silent about it. It might be argued that the seller by stipulating not to warrant against a latent defect in the property, implicitly warns the buyer that there might be a defect in the goods sold and, therefore, he must take the risk if the goods turn out to be defective. This argument is consistent with the language of the Article 448, which generally states that the parties may agree to waive any of the Options available to either of them in the contract of sale. The argument, however, is inconsistent with both the general principle of '*la darar*' which prohibits a person from any activity which may inflict losses to others and the principle of 'good faith' which is implied in every contract of sale and whereupon the seller is bound not to conceal a material defect which is known to him at the time of the sale. Accordingly, the seller should not be allowed to relieve himself from the liability for a defect in the goods where he knows of the defect and instead of declaring it, stipulates that he does not warrant against it. This view is also consistent with the Islamic principle of *man lahol ghom fa alihel ghorm*, since the seller is the person who gains from concealing of the defect which is known to him at the time of the sale and, therefore, the law should impose responsibility on him by invalidating his non-warranty clauses provided in the contract of sale.

⁵⁸ See Iranian Civil Code, Article 424.

The same view should apply in the cases where the seller knows at the time of the sale that the goods sold do not correspond with the descriptions provided in the contract of sale, and yet stipulates to avoid his liability concerning non-conformity of the goods with those descriptions. For it is unjust to allow the seller to benefit from his false descriptions of the goods provided in the contract and at the same time to escape from the consequences of the false descriptions by a contractual clause.

It must, however, be noted that in the sale of goods of a general nature (i.e. when they can be specified from numerous units), the buyer has no Option of Inspection to be excluded by non-warranty clause by the seller.⁵⁹ Therefore, a clause by the seller disclaiming his liability in delivering goods in conformity with the descriptions in the contract of sale is void. Nonetheless, the question may arise as to whether or not such a non-warranty clause will also avoid the whole sale between the parties concerned under Article 233(2).⁶⁰ The answer to the question seems to be affirmative since, under the Islamic principle of *iza ta' araza tasagata*, the conflict between the seller's obligation to deliver goods in conformity with the description in the contract and his non-warranty clauses disclaiming this obligation invalidates both of these clauses. This means that the vendor sells goods of a general nature to the purchaser without agreeing on their descriptions with the latter, in which case the transaction between the parties would be null and void, under Article 351,⁶¹ and the buyer can recover the price and any fruit or benefit which the seller has derived from the price.⁶²

For the same reason, in a sale by sample the seller's stipulation disclaiming his liability for non-conformity of the goods with the sample will nullify the transaction

⁵⁹ Iranian Civil Code, Article 414.

⁶⁰ For the full text of Article 233 of the Iranian Code, see Appendix IV.

⁶¹ For the full provisions of this article, see Appendix IV.

⁶² Unlike the cases where one of the parties cancels the transaction which is effective from the time of the cancellation, voidness of the transaction has retrospective effect on the parties concerned.

between the parties, in which case the buyer must return the goods to the seller and demand him to return the purchase price.

Chapter 5

The seller's liability as to quality of the goods under the UN Convention for International Sale of Goods (CISG)

Under the CISG, the seller's obligation, concerning the quality of the goods sold is dealt with in Articles 35 and 36

Paragraph (1) of Article 35 requires the seller to deliver goods, which conform to the contract (conformity principle), and paragraph (2) of this Article sets conformity criteria. This paragraph states:

"The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract."

The phrase "required by the contract", which is repeatedly used in this Article, indicates that the seller's obligation as to the quality of the goods referred to in this provision, in contrast with the Anglo-US systems, is not imposed by the law. Rather like the civilian tradition, it arises from the parties' consensual agreement. Therefore, it could be said that, except in the case of sale for a particular purpose where the buyer's reliance on the seller's skill or judgement is crucial in holding the seller liable for failing to deliver goods which are fit for that purpose, the buyer's reliance, unlike the Anglo-US systems, is not material in determining the extent of the seller's liability as to the quality of the goods delivered. In other words, the existence of a contractual term under the CISG does not depend on whether or not it was relied on by the buyer. It seems, therefore, the seller may not escape from liability for failing to deliver goods in conformity with the statement as to the quality simply by arguing that the statement was not relied on by the buyer, or that it was merely a reflection of his opinion about the goods, and, accordingly, did not constitute a warranty of quality as against the buyer. Nevertheless, the possibility that a court may consider the issue

of the existence of contractual terms as a subject matter of validity to be governed by its domestic law threatens to undermine uniformity in the application of the CISG.

In accordance with Article 35(1) of the CISG, the seller's failure to deliver goods in conformity with the contractual specifications as to quality, quantity and description is in breach of the contract, entitles the buyer to resort to the remedies provided by the CISG. In 1993, for example, the arbitral tribunal found the French seller to be in breach of the contract with the Syrian buyer since some of the goods delivered did not conform to the specifications provided in the contract and ordered reimbursement of the buyer for the sums paid for these goods. Referring to Article 1153-1 of the French Civil Code, the tribunal also awarded the buyer interest, even though it was found that Article 84 of the CISG was somewhat ambiguous as to whether interest was payable if it had not been requested by the buyer.¹ Nonetheless, the buyer may avail himself of the provisions of Article 35(1) only if he examines the goods and gives notice to the seller specifying the nature of lack of conformity within a reasonable time after delivery. Accordingly, in one case, the German court applying the CISG, dismissed the plaintiff's claim for damages for non-conformity of the goods against the defendant seller. The Court held that the plaintiff had failed to give notice to the defendant specifying the lack of conformity within a reasonable time under Article 39(1) of CISG even though he had examined the goods pursuant Article 38 and detected the lack of conformity in due time, since the notice was given only three months after delivery of the goods.²

The drafters of the CISG, nevertheless, failed to state whether the seller is liable for non-conformity of the goods with his statements concerning their quality made after making the contract with the buyer. Under English law, such a statement after the contract does not bind him against the buyer because of a lack of consideration on the part of the latter, whereas, under the American UCC, the time of the statement, with regard to the quality of the goods is, immaterial.³ The Iranian Civil Code does

¹ See *United Nations General Assembly*, A/CN.9/SER.C/ABSTRACTS/8 (21 December 1995) Case 103, at p. 3; *Journal de Droit International*, 1993, 1041.

² See *United Nations General Assembly*, A/CN.9/SER.C/ABSTRACTS/12 (26 May 1997) Case 167, p. 5.

³ See pp. 232-234, ante.

not contain any express provision in this regard, but since the parties are allowed to amend their contract, even if there is no consideration on the part of either of the parties for the amendment of the contract, the seller's statements with regard to the quality of the goods made after the contract, may render him liable if they are found inconsistent with the statements. Under Scots law, the seller's statement, concerning the quality of the goods sold, does not affect his liability under the contract if the statement is made after the conclusion of the contract. However, such a statement may constitute a unilateral promise by the seller which binds him as against the buyer⁴. Accordingly, the question of whether the buyer can sue the seller for failing to deliver goods in conformity with the statements made by the latter after the conclusion of the contract is, unfortunately, left to be resolved by reference to the domestic laws of the forum where the case is to be heard. One may, however, argue that the price set in the contract is based on the understanding that the quality of the goods would conform to any statement made by the seller, regardless of the time when such a statement is made. If this view is correct, then any statement by the seller after the contract concerning the quality of the goods is contractually binding and the buyer may, without offering any consideration for such an statement, sue him for breach of Article 35 if he fails to deliver goods in conformity with the statement.

There is a major difference between the provisions of the CISG and those of its predecessor ULIS. Article 33(1) of ULIS stated that the seller would not have fulfilled his duty to deliver if the goods handed over failed to conform with the requirements of the contract, whilst, under the CISG, the delivery is considered to have taken place by handing over of the goods which meet general description of the goods,⁵ even though they are not in conformity with the contract with respect of quantity or quality.⁶ In other words, unlike ULIS, the CISG distinguishes between the

⁴ This view has been taken from academic discussion with Professor Forti during my LLM course as well as with Professor Gretton George L. as my ex-Ph.D. supervisor and therefore, I am grateful to both of them in this respect.

⁵ See, Commentary on the Draft Convention on Contract for the International Sale of Goods, prepared by the United Nations Secretariat in United Nations Conference on Contracts for the International Sales of Goods (Vienna, 10 March - 11 April 1980), Official Records, New York, 1981, 14-66, I, 32.)

⁶ But, the fact that seller is regarded having fulfilled the duty of delivery under the CISG does not affect the buyer's remedies for their non-conformities.

case of non-performance, where the seller fails to hand over the goods to the buyer, and that of defective performance, where he delivers goods which do not conform with the contractual requirements. The distinction is important since, in the latter case, the buyer is required to examine the goods⁷ and duly notify the seller of the assumed lack of conformity in them, otherwise he will lose the right to recourse to the remedies provided under the CISG against the seller for breach of the contract in failing to deliver the goods in conformity with the contractual requirements.⁸ This was the case, for example, where the German buyer of fresh cucumbers appealed against the decision of the court of first instance which rejected his application for a reduction of the price for non-conformity with contract specifications and ordered him to pay to the Turkish seller the balance of the price due under the contract. In this case, the German appellate court found that CISG was applicable as part of the German law agreed between the parties and upheld the judgement of the court of first instance on the ground that the buyer lost the right to rely on non-conformity of goods and reduce the price proportionally for failing to give notice of non-conformity in due time; instead he gave notice of the defect only when the goods arrived in Germany, i.e., seven days after he had opportunity to examine the goods at the place of delivery in Turkey.⁹ In another case, the defendant, a German buyer of textiles, alleged reduction of the sale price on the basis of lack of conformity in the goods delivered. The appellate court, applying the CISG rejected his allegation on the ground of his failure to raise the issue of lack of conformity within a reasonable time. The court found that the buyer could have discovered easily the non-conformities in the goods and raised the objection within a few days after delivery and held that the notice of defects given only after two months after deliver was not considered within reasonable time within the context of Article 39 of CISG.¹⁰

An important consequence of the introduction of the innovative unifying notion of defective performance into the CISG is to avoid the troublesome distinctions both

⁷ See CISG, Article 36.

⁸ See CISG, Article 39.

⁹ See *United Nations General Assembly*, A/CN.9/SER.C/ABSTRACTS/3 (24 May 1994), Case 48 at pp. 3-4.

¹⁰ See, *United Nations General Assembly*, A/CN.9/SER.C/ABSTRACTS/6 (10 April 1995), Case 81 at

between conditions and warranties under the English law,¹¹ and between the delivery of goods of different kinds (*aliud pro alio*) and defects or lack of qualities.

The provisions of Article 35 furthermore treat both express and implied terms of the contract in the same unified manner. That is, any deviation, however trivial, from contractual terms concerning the quality of the goods delivered is taken as defective performance¹², which entitles the buyer to resort to the remedies provided by the CISG under Articles 46 to 52. Thus, unlike some domestic systems as well as ULIS,¹³ in the absence of an agreement to the contrary by the parties concerned, the principle of *de minimis* does not apply to a contract which is subject matter of the CISG,¹⁴ unless an established trade usage so provides.¹⁵ But the remedies available to the buyer under the CISG may, depending on whether or not non-conformity constitutes a fundamental breach, differ from one case to other.¹⁶

Unfortunately, the drafters of the CISG failed to provide for similar provisions as those of the Iranian law tradition requiring the seller to deliver goods, which are priceworthy and free from latent defects.¹⁷ This means that, like Anglo-US law, the seller, under the CISG, will have no liability as against the buyer, in so far as the goods delivered are in conformity with the contract specifications and suitable for the purposes for which they are acquired by the buyer, even though they suffer from latent defects which were known to the seller but he refused to reveal them to the buyer at the time of the sale. Nonetheless, in accordance with Article 35 of the CISG the seller is liable for any non-conformity of the goods with the contractual specifications or any defect which renders the goods unsuitable for the purpose for which they are purchased by the buyer even though, like Anglo-US law as well as the

p. 3.

¹¹ See pp. 22-24, ante.

¹² See CISG, Article 45.

¹³ Concerning the applicability of the principle of *de minimis non curate lex* (the law does not pay any attention to trifles) under the English law See, Atiyah, *The Sale of Goods*, *op. cit.*, *supra.*, Part 1, Ch. 1, note 73, p. 106.

¹⁴ In this respect, the Vienna Conference rejected an Australian proposal to the effect that minor differences in quantity or quality of the goods should be regarded as immaterial.

¹⁵ For detailed discussion on the role of a trade usage under the CISG, see Amy H. Kastely, "Trade Usages in International Sales of Goods: An Analysis of the 1964 and 1980 Sales Conventions" (1984) 24:3 *Virginia Journal of International Law* 619.

¹⁶ See pp. 162-179, ante.

civilian tradition, the seller was unaware of the non-conformity or defect in the goods at the time of the sale, unless such a lack of conformity or defect was known to the buyer or, unlike the Iranian system, he could not have been unaware of it when the parties entered into the contract.

The question, however, arises in the cases where the lack of conformity in the goods is known to both the seller and the buyer, or they could not have been unaware of it when they enter into the contract with each other, since, in such instances, on the one hand, the CISG, under Article 35(3), excludes the seller's liability as to the non-conformity of the goods sold, while, on the other hand, under Article 40, it states that the seller will be liable even if the buyer fails to give notice to the seller specifying the nature of the lack of conformity within a reasonable time as required by Articles 38 and 39. It seems that the seller is to be excluded from any liability in such instances where he reveals the lack of conformity to the buyer at the time of the contract, unless the contract clearly states that the parties did not intend to exclude the seller's liability by revealing non-conformities to the buyer, since the seller by specifying lack of conformity to the buyer passes the risk of non-conformity to the him. Similarly, the seller should also be exempted from being liable for non-conformities of the goods with contractual specifications where the defects are actually known to the buyer at the time of the sale, even though his knowledge has not been acquired through disclosing of non-conformities by the seller, unless there is clear evidence to lead the buyer to believe that the lack of conformities would be cured by the seller before delivery of the goods to the buyer. Where, however, the buyer could have discovered the non-conformities of the goods but because of his own negligence he failed to do so, it seems unreasonable to discharge the seller from liability as against the buyer if he knew of the non-conformities at the time of the contract but did not reveal them to the buyer. For as the German appellate court in one case pointed out: "even a very negligent buyer deserves more protection than the fraudulent seller."¹⁸ In this case, the defendant sold a used car to the plaintiff, both

¹⁷ See pp. 281-285, ante.

¹⁸ *United Nations General Assembly, A/CN.9/SER.C/ABSTRACTS/12* (26 May 1997), Case 168 pp. 5-6.

parties being car dealers. The documents relating to the car showed that it was first licensed in 1992 and the mileage on the odometer was low. The parties provided for the exclusion of any warranty. The plaintiff later sold the car to a sub-buyer, who, as a matter of fact, detected that the car was first licensed in 1990 and that the actual mileage on the odometer was much higher. The plaintiff brought an action against the defendant to recovering the damages which the former had to pay to the sub-buyer for non-conformity of the goods with the contract specifications. Pursuant to Articles 35(1), 45 and 74 of the CISG, the court held in favour of the plaintiff. Referring to the general principles embodied in Articles 40¹⁹ and 7(1) of CISG, the appellate court held that, although the plaintiff could have discovered the car's lack of conformity with the contract, the defendant could not avail himself of Article 35(3)²⁰ of CISG for, the defendant knew the actual age of the car and accordingly acted fraudulently. Similarly, where an Italian plaintiff sold and delivered wine which contained %9 water to the German defendant who refused payment on the basis of unmerchantability of the wine, the court, following Article 40 of the CISG, found that the plaintiff could not have been unaware of the non-conformity and held that the defendant had not lost his right to rely the non-conformity of the wine, even though the defendant did not comply with Articles 35, 38 and 39 of CISG to examine the wine for water after delivery and to give notice of the defect to the plaintiff within a reasonable time thereafter.²¹

Unlike Anglo-US law, Article 40 of the CISG following the civilian tradition states that the seller who knew, or could not have been unaware, of the lack of conformity in the goods, but failed to disclose it to the buyer cannot invoke the provisions of Articles 38 and 39 concerning the buyer's duty to examine the goods and give notice to the seller specifying within a reasonable time the nature of the lack of conformity.²² In other words, like French law, non-disclosure of the defects in the goods by the seller rightfully entitles the buyer to avail himself of the remedies

¹⁹ For the full provisions of Article 40 of CISG, see Appendix V.

²⁰ For the full provisions of Article 35 (3) of CISG, see Appendix V.

²¹ See *United Nations General Assembly*, A/CN.9/SER.C/ABSTRACTS/12 (26 May 1997), Case 170 p.7; *Neue Juristische Wochenschrift-Rechtsprechungreport* (NJW-RR) 1996, 564.

²² J.D. Feltham, "The United Nations Convention on Contract for the International Sale of Goods",

provided under the CISG, even if the buyer has failed to give notice of defect specifying the nature of the defect within a reasonable time, as required by Articles 38 and 39 of CISG. For example, in a series of contracts for the sale of goods on F.O.B. terms, the buyer disputed, both prior to shipment and upon arrival, the conformity of goods with certain contractual specifications. To make the goods more saleable, the buyer treated the goods and sold them at a loss. The seller asked for full payment of the price, and the buyer, in a counterclaim, applied for compensation for direct losses, financial costs, lost profits and interest. The arbitral tribunal of International Court of Arbitration, applying the CISG, found that the buyer had complied with the requirements of Articles 38(1) and 39(1) of CISG in examining of the goods and notifying the seller in a reasonable time. Referring to Article 40 of the CISG the tribunal held that the seller would not be entitled to invoke the buyer's non-compliance with Articles 38 and 39 of CISG to discharge his liability for delivering non-conforming goods since the seller knew, or could not have been unaware, of the non-conformity of the goods with contract specifications at the time of the contract.²³

Paragraph (2) of Article 35 of the CISG sets out a series of objective standards which, in the event of the parties' failure to provide express or implied provisions concerning quality of the goods, will determine whether and to what extent the seller has complied with his obligation in delivering of goods in conformity with the contractual requirements. In other words, the standards set out in this paragraph have a supplementary role and they are applicable only if the parties do not expressly fix the quality and description required by the contract,²⁴ since, only in such instances, it becomes necessary to interpret the contract to find out the exact definition of the seller's obligations with respect of the quality of the goods through the standards mentioned above. To achieve this goal, the CISG, following common law systems, has given the purpose for which the goods are acquired by the buyer an overriding

(1981) *Journal of Business Law* 346, at p. 354.

²³ See *United Nations General Assembly*, A/CN.9/SER.C/ABSTRACTS/3 (24 May 1994) Case 45, p. 2; *Yearbook Commercial Arbitration*, vol. XV (1990), p. 70.

²⁴ See Bianca, *Conformity of the goods and third party claims*, in Bianca-Bonell, *Commentary on the International Sales Law*, (1987) p. 272.

significance. Where, for example, a car is sold, the seller's obligation concerning its quality may depend on whether it is to be used as a road vehicle, as scrap metal or for exhibition in an art museum, be differed.

Fitness of goods for ordinary purposes

According to Article 35(2)(a) of the CISG, in the absence of an agreement by the parties on certain specific qualities, the goods delivered by the seller must primarily be fit for the purpose for which goods of the same description would ordinarily be used. Accordingly, the Italian manufacturer of tile was held to have breached the contract with the German company under CISG, since the goods delivered were not fit for the purpose for which goods of the same description would ordinarily be used.²⁵

In order for the goods to be fit for ordinary use, they must possess the normal qualities: i.e., the characteristic normally required from goods as described by the contract, and they are to be free from defects normally not expected in such goods.²⁶ The goods are considered to be unfit for their normal use if they lack proper characteristics, or defects impede their material use, or yield abnormally deficient results, or take unusual costs. The goods also are unfit for ordinary use if the lack of proper characteristics or the defects, though not affecting the material use of the goods, lessen conspicuously their value affecting their trade use. For example, where the plaintiff, an Italian tie manufacturer demanded payment of the balance due under a contract from the defendant, a German company, the German court, applying the CISG, found that the plaintiff failed to deliver goods fit for the purpose for which goods of the same description would ordinarily be used and, as a consequence, held that the defendant was entitled to declare the contract partially avoided and to reduce

²⁵ See *United Nations General Assembly*, A/CN.9/SER.C/ABSTRACTS/3 (24 May 1994) Case 50, p. 4; *Recht der Internationalen Wirtschaft (RIW)* 1992, 651.

²⁶ As an example, see *United Nations General Assembly*, A/CN.9/SER.C/ABSTRACTS/12 (26 May 1997), Case 170 p.7, the fact of which stated in note 17 above; *Neue Juristische Wochenschrift-Rechtsprechungreport (NJW-RR)* 1996, 564.

the price.²⁷ On the other hand, in another case, a Swiss company sold New Zealand Mussels to a German buyer who refused to pay because the mussels had been found by the Federal Health Office to be generally not safe because they contained a cadmium concentration in excess of the statutory limit of 0,5 mg/kg. The German court of appeal held that the supply of mussels with higher cadmium composition did not constitute lack of conformity of the mussels with the contract specifications under Article 35(2) of the CISG, since the mussels were still fit for eating.²⁸

In the case of sale of multi-purpose goods, however, the CISG does not state whether the seller have complied with the provisions of Article 35(2)(a) if they are fit only for some of the purposes within the range of their ordinary purposes. It seems that, in such instances, the seller should be held liable if the goods are not fit for any purpose within the range of ordinary purposes, unless use of the goods for such a purpose has been excluded by contract.

Furthermore, the CISG contains no provision to specify whether the place of business of the seller or of the buyer is to be taken as the standard for ascertaining the fitness of the goods for their ordinary uses. This question has already caused a dispute among the legal authors. Professor Schlechtriem states that "ordinary use" should be defined:

"by the standard of the country or region in which the buyer intends to use the goods. In Europe, gasoline for the operation of cars is still understood as leaded gasoline, whereas the expectation of an American buyer who stocks up on gas on the Rotterdam spot market might be directed toward unleaded gasoline."²⁹

This view is not shared with other prominent writers, such as Professor Bianca who maintains that:³⁰

"The fitness for ordinary use must be ascertained according to the standard of

²⁷ See *United Nations General Assembly*, A/CN.9/SER.C/ABSTRACS/3 (24 May 1994) Case 50, pp. 4-5; *Recht der Internationalen Wirtschaft (RIW)* (1992) 62; *Diritto del commercio internazionale* (July-September 1993) p. 651.

²⁸ See *United Nations General Assembly*, A/CN.9/SER.C/ABSTRACS/6 (10 April 1995) Case 84, pp. 4-5; *Recht der Internationalen Wirtschaft (RIW)* (1994), 593.

²⁹ Schlechtriem "The Seller's Obligations Under the United Nations Convention on Contracts for the International Sale of Goods", in Galston N.M. - Smith. (Eds.), *International Sales*, (1984, New York) Chapter 6, p. 21.

³⁰ See Bianca, *Conformity of the goods and third party claims*, in Bianca - Bonell, *Commentary on the International Sales Law*, (1987) p. 274.

the seller's place of business."³¹

He goes on to argue that the seller is not supposed to know about specific requirements or limitations in force in other countries unless that may reasonably be expected from him according to the circumstances.³² In other words, he agrees that the standard for the definition of the fitness of the goods for ordinary use must be the place where they are to be sent or used if the seller knew, or he should reasonably know, the said standard at the time of the contract. It seems, however, that this approach should also apply even if there is no evidence to show that the seller was aware of the foregoing standard. The seller should not be discharged from the liability under Article 35(a) for failing to deliver goods which are fit for their ordinary use at the place where they are to be sent or used simply because he did not know the standard of fitness for ordinary use at that place. In fact, it is part of the seller's duty under the contract to discover the said standard if he is to deliver goods in conformity with the contractual requirement. Such a duty could be deduced by analogy to Article 42(1), under which the seller is required to deliver goods which are free from any right or claim of a third party based on industrial property or other intellectual property under the law of the State where the goods will be resold or otherwise used (if it was contemplated in the contract that the goods would be resold or otherwise used in that State) or under the law of the State where the buyer has his place of business. This duty, like any other seller's obligations with respect of the quality of the goods is not, as pointed out earlier, based on the buyer's reliance but it arises directly from the contract. This means that the seller is bound to deliver goods, which are fit for ordinary use according to the standard of the place where they are to be used by the buyer, even though this standard is unknown to him at the time of the contract. If he does not know the place where the goods are to be used, the standard for the fitness of the goods for ordinary use should be the buyer's place of business. The German court, applying the CISG, followed this approach in one case. In this case, the plaintiff, a Swiss company, sold New Zealand mussels to the defendant, a German company. The defendant refused to pay as the mussels had been found by

³¹ *Ibid.*

the German Federal Health Office to be generally not safe for containing a cadmium concentration in excess of the statutory limit of 0.5 mg/kg. The appellate court referring to the statutory cadmium limit in Germany (i.e., the place where the goods were to be used by the buyer) and found that this limit expressed an optimum situation of food items and was not a binding maximum limit, and, accordingly, held that the high cadmium composition did not constitute lack of conformity of the mussels with contract specifications under Article 35(2) of the CISG, since the mussels were still edible.³³

The CISG does not specify what grade of quality of the goods the seller is to tender to fulfil his obligation in conformity with the contract requirement under Article 35. In the Vienna Conference, the Canadian delegation proposed an amendment whereby the goods would be considered as reasonably fit for the purposes for which goods of the same description would ordinarily be used if:

“(a) they are of such quality and in such condition as it is reasonable to expect having regard to any description applied to them, the price, and all other relevant circumstances; and
if the goods, in the case of fungible goods, are of fair average quality within the description... and... of an even kind, quality and quantity within each unit and among all units involved...”

The delegation later withdrew this proposal leaving open the question whether the seller, in the absence of contrary indication in the contract, is obliged to deliver goods of average quality.

³² *Ibid.*

³³ *United Nations General Assembly*, A/CN.9/SER.C/ABSTRACTS/6 (10 April 1995) Case 84, pp. 4-5; *Recht der Internationalen Wirtschaft (RIW)* 1994, p. 593. However, this approach was rejected by the German Supreme Court by holding that:

“Articles 35(2)(a) and (b) CISG does not place an obligation on the seller to supply goods, which conform to all statutory or other public provisions in force in the import state, unless the same provisions exist in the export State as well, or the buyer informed the seller about such provisions relying on the seller’s export knowledge, or the seller had knowledge of the provisions due to special circumstances.”

See *United Nations General Assembly*, A/CN.9/SER.C/ABSTRACTS/9 (7 June 1996) Case 123, pp. 3-4; *Entscheidungen des Bundesgerichtshofs in Zivilsachen (BGHZ)* 129, p. 75, Schlechtriem, “*Entscheidungen zum Wirtschaftsrecht*” (EwIR) Art 35 CISG 1/95.

In many countries this issue has been addressed by requiring the seller of generic goods to provide goods of at least average quality. As an example, Article 289(2) of the Greek Civil Code and Article 243 of the German Civil Code lay down that performance of a generic obligation must be of average kind and quality. Similarly, under section 2-314 of the UCC, the seller is required to deliver goods which are merchantable and this obligation is satisfied only if they are of a fair average quality.³⁴

In other countries such as New Zealand³⁵ and England,³⁶ however, the seller, in the absence of an agreement to the contrary, may deliver goods, which are of below average quality.³⁷

Lack of express provision in the CISG to deal with the issue of the degree of quality of goods which the seller is bound to deliver under the contract is a source of uncertainty between the parties concerned, which may lead to forum shopping in an international sale by them.³⁸ To avoid such an uncertainty, the parties are recommended to stipulate in their agreement the degree of quality of the goods, which is to be delivered by the seller to satisfy his obligation under the contract.

Fitness of goods for particular purpose

Following the common law systems, the CISG distinguishes “ordinary use” from the “particular purpose” for which the goods are purchased by the buyer. The distinction is decisive for qualities of the goods where the buyer has made it expressly or impliedly known to the seller at the time of the conclusion of the contract. In accordance with Article 35(2)(b) of the CISG, the seller must deliver goods which:

“are fit for any particular purpose expressly or impliedly made known to the

³⁴ Under Article 1246(3) of the French, Belgian and Luxembourg Civil Codes and Spanish Civil Code, Article 1167, the seller who is obliged to deliver generic goods need not deliver the best, but may not deliver the worst quality. In accordance with Article 6: 28 of Dutch BW and Article 1178 of Italian Civil Code the goods delivered must not be below average good quality.

³⁵ See, for example, *Taylor v. Combined Buyers Ltd.* [1924] NZLR 627, 645.

³⁶ *Kendall v. Lillico* [1969] 2 AC 31, 79-80 per Lord Reid.

³⁷ See pp. 203-204, ante.

³⁸ See Article 7(2) of the CISG.

seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement."

According to these provisions, the seller is obliged to deliver goods which fit the buyer's particular purpose provided that such purpose has expressly or impliedly been made known to the seller at the time when the contract was made. For example, if a buyer orders equipment to be used in the extensive hot weather of the State of Kuwait but is destined for use on a pipeline-laying job in Siberia in winter, the equipment delivered must have special qualities to make it suitable for operation in severe cold, on frozen soil or ice.

As pointed out earlier, the seller's liability in such instances, is based on the principle of reliance by the buyer. Where the purpose for which the buyer intends to use the goods is apparent or is made known to the seller, the buyer is presumed to have relied on the seller's skill or judgement to receive goods which are suitable for that particular purpose. Nonetheless, the mere fact that the buyer has informed the seller about his particular purpose does not render the seller liable under Article 35(2)(b) if the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill or judgement.

Strictly speaking, the buyer's reliance on the seller's skill or judgement is a question of fact, although whether his reliance is "unreasonable" must involve an element of evaluation. Where the seller is also the manufacturer of the goods it is hard to rebut the reliance by the buyer who has brought to the attention of the seller the purpose for which he has intended to use them. The fact that the seller and the buyer are both members of the same commodity market might be used as evidence against inference of the buyer's reliance, but it does not necessarily negate such reliance. Where, for example, the buyer-merchant has informed the seller of his particular purpose in purchasing the goods before the time of the conclusion of the contract and the seller has recommended them to the buyer such reliance may be found. Similarly, the mere fact that the buyer himself has chosen the goods purchased does not mean he did not rely on the seller's skill or judgement in purchasing the goods. Suppose, for example, the seller-manufacturer receives an order in which the buyer informs him that he intends to use the goods in Saudi Arabian desert. The fact

that the buyer is allowed to choose the goods from the seller's store does not negate the seller's liability for lack of reliance if the goods are proved to be against the hot weather. Nonetheless, a difficult question, under the CISG, is whether an inspection of the goods by the buyer before the sale may rebut the inference that he is relying on the seller's skill or judgement. It seems that the answer to this question depends on whether or not the buyer, by such an examination, may reasonably detect the defect, which causes the goods to be unfit for the particular purpose for which the buyer requires them. Only in the latter instances, can the buyer invoke the Article 35(2)(b). Similarly, where the buyer has invited a third party to examine the goods on his behalf, and the third party has reported favourably to the buyer in reliance on the seller's skill or judgement, there may be a question whether the buyer himself can be regarded as having relied on the seller's skill and judgement or whether he has merely relied on the third party report. It seems that there is no reasonable ground to prevent the buyer from invoking the provisions of Article 35(2)(b) against the seller in such circumstances if the goods delivered are not suitable for the particular purpose for which they are purchased. On the other hand, where the seller supplies goods in conformity with the specifications provided by the buyer, lack of reliance by the latter prevents him from invoking the provision of this Article, unless the non-suitability of the goods is related to matters which were not contained in the buyer's specifications and on which the buyer has relied on the seller's skill or judgement.

If the buyer is more skilful than the seller it is unreasonable to presume that he has relied on the seller's skill or judgement that the goods purchased would be fit for the particular purpose for which the buyer is intended to use them. Similarly, if the buyer, at the time of contract, was well aware that the seller could only supply him with one particular brand of goods in question it can hardly be said that he has relied on the seller's skill or judgement.

As pointed out above, under Article 35(2)(b), the buyer may sue the seller for failing to deliver goods in conformity with his particular purpose for purchasing them, provided he has expressly or impliedly made known this purpose to the seller at the time of the contract. An unanswered question in this respect, under the CISG, is whether the protection afforded to the buyer, under this provision, covers the cases

where the seller himself acquires such knowledge before the conclusion of the contract with the buyer. Nonetheless, it seems that, under the general principle of good faith, the seller is bound to inform the buyer if the goods are not suitable for his particular purpose for which he purchased the goods, otherwise the seller would be liable for failing to deliver conforming goods unless he can show that the buyer did not, or could not reasonably, rely on his skill or judgement at the time of the contract.

It is, however, to be noted that provisions of Article 35(2)(b) are not concerned with the cases where the seller himself illustrates the special purpose the goods are fit for or where the buyer orders goods to be fit for specific purpose. Such instances are clearly covered by Article 35(1), which deals with sale by description.

Conformity of the goods with the sample

The third criterion for complying with the CISG requirement to deliver goods in conformity with the contract is that they must possess the qualities of goods which the seller has held out to the buyer as a sample or model.³⁹ Accordingly, The rule that obligates the seller to deliver goods conforming to the standard of a sample or model is applicable in almost all modern legal systems, though it might be interpreted differently by each system. For example, under English law, the mere fact that a sample was provided by the seller for the buyer's inspection is not sufficient to make the sale a sale by sample.⁴⁰ This approach has given rise to confusion in respect of parole evidence, as it is not clear whether or not such evidence is admissible to show that a sample was produced to the seller and that the sale is a sale by sample when the contract is reduced to writing and writing does not make any reference to a sample.⁴¹ Similarly, under Article 33(c) of ULIS, the seller was not bound to deliver

³⁹ See, for example, *United Nations General Assembly*, A/CN.9/SER.C/ABSTRACTS/10 (16 August 1996) Case 131 p. 3.

⁴⁰ See PS Atiyah, *The Sale of Goods*, *op. cit.*, *supra.*, Part 1, Ch. 1, note 73, pp. 177-178.

⁴¹ In many cases, the courts in England have refused to accept that parole evidence would be sufficient to prove that the sale was a sale by sample, while in other cases it was held to be sufficient for holding the sale as a sale by sample. See the cases which Professor Atiyah has quoted in this respect. *Ibid.*

goods which correspond with the sample or model in quality if he had submitted the sample or model to the buyer without expressly or impliedly undertaking that the bulk would conform therewith. This provision could give rise the same problem as that of English law with respect to parole evidence. The CISG has avoided this problem by eliminating the foregoing reservation in ULIS. This is because the submission of a sample or a model involves by itself the seller's promise to provide goods possessing the same qualities as those of the sample or the model shown to the buyer. This approach seems to be consistent with Iranian law, under which both written and parole evidence are treated equally.

The CISG does not directly address the issue of whether the seller is in breach of Article 35(2)(b) where non-conformity of the quality of the goods with that of sample or model is trivial. However, Article 36(1) expressly provides that the seller would be liable for "any lack of conformity" in the goods delivered provided that such non-conformity exists before the risk passes to the buyer. It follows from this that, unlike English law, the seller, under the CISG, will be responsible for any non-conformity, however trivial,⁴² in the quality of the goods with the sample or model presented to the buyer for inspection. The same approach has been adopted by the UCC in respect of the sale by sample or model,⁴³ which, unlike English law, is regarded as an express warranty.⁴⁴ Of course, the seller who has presented a sample or model with the intent to point out only some qualities of the goods is not bound to deliver goods totally conforming to that sample or model. However, this intention has to be clearly expressed by him in the contract.

In accordance with English law, the use of sample by the seller does not protect him from the liability for hidden defects, which are not reasonably discoverable by examination of the sample, and renders the goods unsatisfactory.⁴⁵ The CISG does not contain an express provision to this effect. Professor Bianca argues that:

"the submission of a sample or a model is a factual description and, therefore a

⁴² As to the position under English law, *see* pp. 184-185, 206, *ante*.

⁴³ It is to be remembered that, unlike a sample, a model is not drawn from the bulk of goods for sale.

⁴⁴ *See* UCC, Section 2-714.

⁴⁵ *See* Sale of Goods Act 1979 (as amended by Sale and Supply of Goods Act 1994, Section 14(2C)(c)).

contractual way to determine the kind and quality of the goods the buyer is entitled to.”⁴⁶

He goes on to conclude “that the reference to a sample or a model excludes the application of the examined criteria [paragraph] (a) and (b) [of Article 35(2)].”⁴⁷ This argument, however, seems untenable. Because there is no provision in the CISG to prevent some or all of the criteria set in Article 35(2) for conformity of goods to be applicable together in such instances. The parties, of course, are free to exclude the seller’s obligation arising from subparagraph (a) and (b) in so far as it is valid to do so under domestic law applicable to the contract⁴⁸ but, they may equally agree not to exclude either or both of the said subparagraphs from their contract as they may agree on an obligation for the seller not provided by the CISG.

The duty that the goods are properly contained or packaged

The last standard for the goods to be in conformity with the contractual requirement under the CISG is that they are adequately contained or packaged at the time of delivery. This provision, which is similar to that of section 2-314(2)(e) of the UCC, but has no antecedent in ULIS, is very important as it expressly states that the seller’s obligation as to delivery of goods includes his accessory duty to do what is ordinarily required so as to allow the buyer to receive the goods in satisfactory condition.

It is established that the seller in a contract of sale involving carriage of goods has a duty to provide for an adequate packaging of the goods sold. There has been, however, doubt in some national legal systems such as Iranian⁴⁹ and German law⁵⁰

⁴⁶ See Bianca, *Conformity of the goods and third party claims*, in Bianca-Bonell, *Commentary on the International Sales Law*, (1987) p. 276

⁴⁷ *Ibid.*

⁴⁸ The issue of validity of excluding the seller’s liability under these subparagraphs has been excluded from the CISG’s scope and, therefore, it is to be addressed by a domestic law applicable to the contract. See Article 7(2) of the CISG.

⁴⁹ Like English law, there is no express provision under the Iranian Civil Code to require the seller to provide goods which are adequately contained or packaged in order to allow the buyer to receive them in satisfactory condition. Nonetheless, such a duty may be imposed on him by a common usage.

⁵⁰ See Schlechtriem, *The Seller’s Obligations Under the United Nations Convention on Contracts for the International Sale of Goods*, in Galston N.M.-Smit H. (Ed.), *International Sales* (New York 1984) Ch. 6, p. 23.

whether this rule is also applicable to the cases where the delivery takes place at the seller's place of business or where the goods are stocked, manufactured or produced. This uncertainty has been avoided by the provision of Article 35(2)(d) under which the goods in these cases also are required to be properly contained or packaged so as to allow the buyer to load and carry them away. Nonetheless, the parties may agree to shift the burden of packaging the goods to the buyer, but they can do this only through providing a clear contractual clause.

What is the proper manner in which the goods are to be contained or packaged is a question of fact which, depending on the nature of the goods, the way and the distance in which they are to be carried and other surrounding circumstances may differ from one case to another. The seller is bound to provide goods which are contained or packaged in a way adequate to endure the carriage and last till their handing over to the buyer at their destination. If there is a standard manner for containing or packaging the goods sold, it must be observed by the seller at the time of delivery. If the goods are differently contained or packaged from place to place, the seller, under Article 7 of the CISG, must first refer to the usual manner in international trade or, in the absence of such a manner, to the usual manner at his own place of business, unless the destination where the goods are to be carried is known to him and a particular manner is necessary for protecting and preserving them there in which case this manner is to be observed by the seller. The latter solution is consistent with the CISG's principle requiring the goods to be fit for the purpose expressly or impliedly made known to the seller since one of the buyer's purposes is to send the goods to their destination and preserve them there.

Exclusion of the seller's liability with respect of quality of the goods

Article 35(3) of the CISG excludes the seller's liability for any lack of conformity of the goods with the CISG standards set in Article 35(2)(a-d) where the buyer knew of such a lack of conformity or could not have been unaware of it before conclusion of the sale.

The underlying principle of this rule is that the buyer who knows the condition of the goods at the time of the conclusion of the contract could not expect the seller to impliedly warrant the ordinary or particular purpose requisite for the contractual purpose. As Professor Honnold points out, the case which normally falls within Article 35(3) is the sale of specific goods which do not possess "ordinary" qualities within the meaning of Article 35(2)(a). For example, the buyer who has been given a reasonable opportunity to examine the goods which the parties have agreed upon at the time of the conclusion of the contract is assumed to have purchased the goods as they were and, therefore, he will have no remedy as to those non-conformities which would reasonably be discoverable by the examination. Similarly, the seller is not liable for defects in the goods resulting directly or indirectly from their contractual description. Nonetheless, the rule in Article 35(3) does not prevent the buyer from availing himself of the remedies provided by the CISG if non-conformities are related to the hidden defects which were unknown to the buyer and which were not reasonably discoverable by the normal examination of the goods, though they might have been discovered by a special analysis of the goods through an unusually complex or sophisticated professional method.

It is, however, unclear whether the above rule may relieve the seller from the liability for non-conformities resulting in the defects which could have discovered by a normal examination of the goods, where the buyer did not actually examine the goods despite being given a reasonable opportunity to do so. It may be argued that by offering an opportunity to the buyer to examine the goods, the seller impliedly demonstrates his intention to sell the goods as they are and, accordingly, he will have no liability with respect to the defects which could have discovered if the buyer had carried out such an examination of the goods. However, even if such an intention can be inferred from the seller's offer, it is not binding on the buyer unless he consents to it, either expressly by stating so in the contract or by implication through actually carrying out of the examination. In other words, in the absence of an express agreement to the contrary by the parties, the mere opportunity of the buyer to examine the goods does not exclude the seller from the liability concerning non-

conformities arising from defects discoverable by examining of the goods if no such examination has in fact taken place.

The other controversial problem with respect to the rule under Article 35(3) is that it does not refer to the cases where the buyer knows, or could not have been unaware, that the qualities expressly agreed by the parties in the contract are missing. Suppose that the buyer enters into negotiations for the purchase of a machine which is described by the seller as being able to produce mirror glasses of up to 6 mm, but upon examination of the machine before the contract he discovers that the machine in reality has only the capacity of manufacturing mirror glasses of up to 3 mm. The question in such a cases is whether the buyer can still sue the seller for failing to deliver goods which correspond with the contractual requirement under Article 35. Professor Bianca thinks so.⁵¹ According to his view:

“The fact that the buyer knows or ought to know the real condition of the goods is irrelevant when there is specific contractual provision because it does not change the content of what the seller has promised to the buyer nor can it free him from his promise.”⁵²

However, not everybody shares this view. Enderlien, for example, suggested that the rule under Article 35(3) should analogously be extended to cover the lack of conformity under Article 35(1) so as to exclude the seller's liability in the cases where non-conformities in the quality of the goods arising from the express contractual promises which the buyer knew or could not have been unaware that they are missing.⁵³ Referring to this approach, Professor Bianca rejected it as unjustifiable and stressed the idea that:

“the distinction must be kept clear between lack of conformity according to the Convention's criteria (or usage), and according to express contractual provisions (an implied provision about the quality of the goods is not conceivable if the buyer knows ought to know that the goods do not have such quality).”

⁵¹ See Bianca, *Conformity of the goods and third party claims*, in Bianca-Bonell, *Commentary on the International Sales Law*, (1987) pp. 279-280.

⁵² *Ibid.* p. 280.

⁵³ Enderlein F.-Maskow D.-Stargardt M., *Kaufrechtskonvention der UNO (mit Verjährungskonvention)* (Berlin 1985) p. 35 as cited in Bianca, *Conformity of the goods and third party claims*, in Bianca - Bonell, *Commentary on the International Sales Law*, (1987) p. 280.

It would seem that although Professor Bianca is right in distinguishing between the two instances noted above, such a distinction does not necessarily render the seller liable in the latter case, namely, where the goods do not correspond with the express contractual description. For example, there is no justification for the buyer to hold the seller liable in such instances where he has undertaken to inspect the goods at the time of contract if such an inspection would actually reveal the non-conformity of the goods with contractual requirement. For under the Islamic principle of *iza taaraza tasaghata*,⁵⁴ the buyer's commitment to inspect the goods and his actual discovery of their non-conformity renders the contractual promise by the seller ineffective. Under Iranian law, the contract might be void *ab initio* if the contractual promise is the principal obligation of the seller. On the other hand, the seller's liability as to the non-conformity of the goods is not excluded if there is evidence to suggest that he will repair or replace the non-conforming goods before the time of delivery. Such evidence may, for example, be obtained from the course of negotiations, any practices which the parties has established between themselves, or usages of trade with respect of the goods sold. Accordingly, it would seem that the contractual descriptions, in such instances, loses its character and, therefore, the correct way to ascertain whether or not the buyer is entitled to hold the seller liable for the lack of conformity in the goods is to determine the parties' common intention by interpreting the contract in the light of Article 8(3).

Disclaimers

The possibility that an interpretation of the contract may, in certain circumstances, reduce or exclude the seller's liability under Article 35 presents the issue: whether and to what extent the seller may reduce or exclude his obligations and his liability by a disclaimer clause? Article 6 of the CISG explicitly supports such clauses by stating that:

“[t]he parties may exclude the application of this Convention or... derogate from

⁵⁴ In accordance with this principle, two conflicting evidence will eliminate effect of each other.

or vary the effect of any of its provisions.”

The same inference can be drawn from the formulation of the provisions in Article 35(2), according to which the implied warranties of that paragraph are applicable only if the parties have not “agreed otherwise.” Nevertheless, a contractual clause exempting or reducing the seller’s liability for breach of an obligation under Article 35 is ineffective as against the buyer if it does not meet the requirement for validity of such a clause under the provisions of the domestic law which, in accordance with the conflict of laws rules of private law, would govern the contract,⁵⁵ since under Article 4(a) the issue of “the validity of the contract or any of its provision” has been excluded from the scope of the CISG.⁵⁶ In other words, the CISG will not give effect to a disclaimer clause if the substantive domestic law that would otherwise govern the contract would not do so.⁵⁷ Unlike Anglo-US law, under the civilian systems such as Iranian, German and French law, for example, the seller who knew of the defects in the goods, but refused to reveal them to the buyer is considered to have acted fraudulently and, consequently, any contractual clause to negate his liability with respect of these defects would be invalid. Thus, in a contract for the sale of a second hand car, the document presented by the seller showed that the car was first licensed in 1992 and the mileage on the odometer was low. The sale contract included a clause by which the seller excluded his liability for breach of any warranty. The buyer later sold the car to a customer, who detected that the car had been first licensed in 1990 and that the actual mileage on the odometer was much higher. The buyer paid damages to his customer and demanded the same amount as damages from the defendant-seller. The German appellate court, referring to the general principle embodied in Articles 40 and 7(1) of the CISG, and held that the defendant

⁵⁵ See CISG, Article 7(2).

⁵⁶ It has been rightly argued by Professor Winship that although the parties under the principle of freedom of the contract laid down in Article 6 are allowed to alter the CISG or any of its provisions, but this freedom does not reach to such extent as to circumvent national mandatory laws by agreeing to exclude Article 4(a). See Winship, *The Scope of the Vienna Convention on International Sale Contracts*, in *International Sales: The United Nations Convention on Contracts for the International Sale of Goods* (1984) § 1.02[5], at 1-34.

⁵⁷ Report of the Working Group on the International Sale of Goods on the Work of its Sixth session to UNCITRAL para. 32, at 8, U.N. Doc. A/CN.9/100 (1975) reprinted in [1975] 6 Y. B. UNCITRAL para. 32, at 52, U.N. Doc. A/CN.9/SER. A/1975.

could not avail himself of Article 35(3), requiring the buyer to give notice of defect within a reasonable time after delivery, since he (the defendant) knew the actual age of the car and, thus, acted fraudulently. Moreover, although the exclusion of any warranty was possible under Article 6, the appellate court found that the substantial validity of such a clause was not governed by the. In this case, this question was governed by German law, according to which an exclusion of warranty is invalid if the seller acts fraudulently.⁵⁸

Similarly, section 2-316(2) of UCC states that “to exclude ... the implied warranty of merchantability ... the language must mentioned merchantability and in case of writing must be conspicuous.”⁵⁹ The implied warranty of fitness for a particular purpose may be disclaimed by general language, but such a disclaimer “must be by writing and conspicuous.”⁶⁰ Such repeated use of the auxiliary verb “must” demonstrates the mandatory character of section 2-316(2) of the UCC. “The effect of holding a statute mandatory is to require strict compliance with its letter in order ... to enable persons to acquire rights under it.”⁶¹ section 2-316(2)’s mandatory nature denotes that its requirements are those of validity. These requirements are, however, “subject to”⁶² section 2-316(3) of the UCC. A seller who has failed to comply with section 2-316(2) may still have made a valid disclaimer under section 2-316(3).⁶³ Whereas section 2-316(2)’s requirements are quite specific, section 2-316(3) allows for generalities. The existence of such generalities may suggest the conclusion that section 2-316 sets forth mere guidelines for interpretation of the parties’ agreement rather than requirements for valid disclaimers.⁶⁴ This argument,

⁵⁸ See, *United Nations General Assembly*, A/CN.9/SER.C/ABSTRACTS/10 (26 May 1997) Case 168 pp. 5-6.

⁵⁹ See *Walker Ford Sales v. Gaither*, 265 Ark. 275, 277- 78, 578 S.W.2d 23, 24 (1979); *Angola Farm Supply & Equip. Co v. FMC Corp.*, 59 N.C. App. 272, 277, 296 S.E.2d 503, 506-07 (1982).

⁶⁰ UCC, Section 2-316(2). As an example, see *Eaton Corp. v. Magnavox Co.*, 581 F. Supp. 1514, 1533 (E.D. Mich. 1984); *Hi Neighbor Enters. v. Burroughs Corp.*, 492 F.Supp. 823, 826 (N.D. Fla. 1980).

⁶¹ N. J. Singer, *Sutherland’s Statutes and Statutory Construction* (4th ed. , Deerfield, Ill. : Clark Boardman Callaghan, 1984), vol. 2, § 57.12 at 667.

⁶² UCC, Section 2-316(2).

⁶³ See Lord, “Some Thoughts About Warranty Law: Express and Implied Warranties” (1980) 56 *North Dakota Law Review* 509, 680.

⁶⁴ J. Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* (1982), § 234, at p. 259. Professor Honnold argued that section 2-316(3) provides a rule of

however, is unpersuasive for a disclaimer that fails to meet the requirements of either subdivision will be held to be invalid.⁶⁵ section 2-316(3)(a) allows the seller to exclude an implied warranty by using expressions such as “with all faults,” “as is,” or “other language which in the common understanding calls the buyer’s attention to the exclusion of warranties and makes plain that there is no implied warranty.” This is not an automatic disclaimer; the circumstances must be such as to give the buyer reason to know that there is no implied warranty.⁶⁶ In contrast with the UCC, the seller under Iranian law may agree on a disclaimer clause with the buyer to negate or to reduce some or all of his obligations and liabilities with respect to non-conformity of the goods with the warranties implied by the law. A disclaimer clause may be an oral or a written one, and it may either specifically name any implied warranty which is to be excluded or use a general language to negate all implied warranties in the contract. Any exclusionary clause with respect to implied warranties agreed between the parties is valid unless, like the German law,⁶⁷ it discharges the seller from his principal obligation undertaken under the contract. In other words, whilst according section 2-316(3) of the UCC a disclaimer clause may exclude the seller from any liability with respect to the fitness of the goods, such a clause may be void under both Iranian and German systems for negating the principal obligation of the seller.

The rule invalidating a disclaimer clause with regard to implied warranties under any system is mandatory and is designed to protect the buyer from the unexpected and un-bargained for language of a disclaimer and therefore, cannot be excluded by the parties’ agreement.⁶⁸ But inconsistency of such a rule under various legal systems

interpretation because it allows language, which in the “common understanding” of the parties alerts the buyer to the exclusion of warranties, and “makes plain” that there is no implied warranty.

⁶⁵ See, e.g., *Cooper Paintings & Coatings Inc. v. SCM Corp.*, 62 Tenn. App. 13, 19-20, 457 S.W.2d 864, 867 (1970); *Hartwing Farms, Inc. v. Pacific Gamble Robinson Co*, 28 Wash. App. 539, 542, 545-547, 625 P.2d 171, 173-76 (1981); Moye, “Exclusion and Modification of Warranty Under the UCC- How to Succeed in Business Without Being Liable for Not Really Trying” (1969) 46 *Denver Law Journal* 579, 605, 612.

⁶⁶ *Ramirez v. Autosport Corp.*, 88 N.J. 277, 287, 440 A.2d 1345, 1350 (1982); Weintraub, “Disclaimer of Warranties and Limitations of Damages for Breach of Warranties Under the UCC” (1975) 53 *Texas Law Review* 60, 66.

⁶⁷ See, Schlechtriem, *The Seller’s Obligations Under the United Nations Convention on Contracts for the International Sale of Goods*, in Galston N.M.-Smit H. (Ed.), *International Sales* (New York 1984) Ch. 6, p. 24.

⁶⁸ See UCC, Section 2-316, Official comment 1.

is likely to undermine the uniformity in application of the CISG and to cause much uncertainty among the parties concerned.

The time when the goods must be of conforming quality

According to Article 36(1) of the CISG, the seller is liable for non-conformities which are present at the time when the risk passes to the buyer, even if they become evident later.⁶⁹ This provision makes it clear that defects existing at the time of the passage of risk constitute a lack of conformity within the meaning of the CISG regardless of when they are being detected by the buyer. Conversely, the deficiencies which come into existence only after the passage of the risk do not amount to non-conformity so as to render the seller liable under the CISG. This provision, which is identical to the rule of most of the continental systems as well as that of Iranian law,⁷⁰ couples the seller's obligations and liabilities as to the quality of the goods with the passing to the buyer of the risk to pay even though he does not receive the goods, or he receives them in a non-conforming condition.

There may be instances in which the non-conformity, which becomes apparent later, is the result of the development of the condition already existing at the time of the passage of the risk. In such instances it is necessary to ascertain if the goods in their original condition, at the time of delivery, were in conformity with the contractual requirement in quality. But an unresolved question in these instances is whether the buyer has a burden to prove that the goods were already defective when their risk passed to him, or it is the duty of the seller to show that the goods conformed with the contract at the said time.

According to Article 36(2), the seller is also liable for any non-conformity which occurs after the passage of the risk if it is due to his breach of any of his obligations "including a breach of any guarantee that for a period of time the goods will remain

⁶⁹ See, e.g., *United Nations General Assembly*, A/CN.9/SER.C/ABSTRACTS/4 (30 August 1994) Case 56, pp. 3-4; *United Nations General Assembly*, A/CN.9/SER.C/ABSTRACTS/8 (21 December 1995) Case 103, p. 3.

⁷⁰ See, e.g., Swedish Sales law, Article 44; German Civil Code, Section 459(1); Iranian Civil Code, Articles 388.

fit for their ordinary purpose or for some particular purpose or will retain specified qualities or characteristics.” The seller, for example, is liable if the loss or deterioration of the goods occurred because he did not send them with the proper carrier, or because he did not pack them in the proper manner, or because he failed to give the necessary warning as how to handle them.

The last part of this Article clearly indicates that the seller is liable for any express guarantee concerning the durability of the goods, but it does not specify whether he is also liable for breach of an implied guarantee in this respect. In fact, the real issue is whether the buyer, under the CISG, is normally entitled to obtain goods, which will remain fit for a proper period. However, as Professor Schlechtriem argued, the CISG’s provisions on ordinary purposes and particular purpose known to the seller under Articles 35(2)(a) and (b):

“determine for how long the goods shall remain useful and what qualities they have to have at the time the risk passes in order to last that long.”⁷¹

This means that the seller will be liable if the goods fail to remain fit for their ordinary purposes or for a particular purpose during the period implied by the law.

⁷¹ See, Schlechtriem, *The Seller's Obligations Under the United Nations Convention on Contracts for the International Sale of Goods*, in Galston N.M.-Smit H. (Ed.), *International Sales* (New York 1984) Ch. 6, p. 26.

Chapter 6

Conclusion

From this comparative examination of law of the sale with regard to duties of the seller under different jurisdictions one might identify certain main themes. These are as follows:

- 1) The issue of the maintenance of the contract between the parties,
- 2) The issue of balance of interests as between the seller and the buyer, and
- 3) The issue of diversity and uniformity of the law between different legal systems concerning the seller's duties in an international sale of goods.

Maintenance of the contract

Maintenance of the contract is in fact the main goal of the parties in dealing with each other. There are two different methods through which a legal system may achieve this goal. The first method is to restrict the buyer's right to reject goods and to treat the contract as repudiated, and the second method is to allow him to apply for specific performance of the contract by the seller by repairing of the defects in the goods delivered or by delivering of alternative goods in conformity with the contractual terms.

Restriction of the right to reject

Our examination of the legal systems under consideration reveals that with the exception of US, and to a certain extent Iranian law, all these systems generally restrict the buyer's right to reject the goods and to bring the contract to an end for the seller's breach of a contractual term. In the case of English law, for example, the buyer may reject the goods only if the term breached amounts to a condition as

distinguished from a breach of warranty. In the latter case the buyer may only apply for compensation for the damages caused by the breach. Nonetheless, the problem under the English system is that unlike the position under other legal systems under consideration, the key statutory implied terms are considered as conditions, and therefore any breach of them, however trivial, entitles the buyer to reject the goods and repudiate the contract with the seller.¹ This means that the buyer under English law may reject the goods and repudiate the contract of sale for any non-conformity of the goods with, for example, the contractual descriptions when the sale is by description, or with the sample when it is by sample irrespective of how significant is the non-conformity. By contrast, in these circumstances, the buyer under French law cannot cancel the sale if the non-conformity is trivial.² Similar problems have been encountered by English law in contracts involving the carriage of goods by sea with regard to the express terms in the contract in so far they deal with the issue of the time of delivery. Unlike the position under French and Iranian law, the buyer under English law may in such instances reject the goods on a technical basis in order to escape from a bad bargain with the seller.³ As is the case in US law,⁴ the Iranian Code allows the buyer to cancel the sale for any non-conformity, however trivial, of the goods with the contractual terms which have been expressly or impliedly agreed by the parties,⁵ while in contrast with the former system, in the case of late delivery he may reject the goods only if the time of delivery constitutes the essence of the contract between the parties⁶ or if there is no possibility to enforce the contract against the seller by requiring him to deliver the goods within a reasonable time.⁷ The CISG avoids the foregoing flaws under US, English and Iranian law by empowering the buyer to reject the goods only if the breach is fundamental, irrespective of

¹ See pp. 22-24, ante.

² See French Civil Code, Article 1618. See further, p. 18, ante.

³ See p. 14, ante.

⁴ See UCC, Section 2-601. See further, p. 62, ante.

⁵ See pp. 113-114, ante.

⁶ See pp. 121-122, ante.

⁷ *Ibid.*

whether the breach is caused by non-conformity of the goods with implied or express terms or by a late delivery.⁸

Further restrictions on the buyer's right to reject has been provided under English and US⁹ law by empowering the seller in specific circumstances to repair the in-conformity in the goods delivered. The difference between these two systems is that under English law the seller may repair the non-conformity in the goods only if the time for performance of the contract has not expired,¹⁰ whereas under the US system he may do so under certain conditions even if the time for performance of the contract has passed.¹¹ The main problem under both these systems in granting the right to the seller to repair the non-conformity in the goods delivered is that they do not consider the inconvenience which this procedure may cause to the buyer. This problem has been appropriately addressed by the provisions of the CISG under which the seller may, subject to the buyer's right to reject, repair the non-conformity irrespective of whether or not the time for performance has passed provided that it does not cause unreasonable inconvenience to the buyer.¹²

Although there is no correspondent express provision under Iranian and French law to allow the seller to repair the non-conformity in the goods delivered, there seems no reasonable justification for preventing him from doing so where no unreasonable inconvenience arises from the repair to the buyer.¹³

A further problem concerning maintenance of the contract arises where the quantity of the goods delivered is more than what was contracted for by the parties. In such instances, French law does not allow the buyer to divide the goods delivered and therefore, he may either reject the whole goods or accept them and to pay for the excess at the contractual rate. In addition to this option, English and US law allow the buyer to accept any part of the goods delivered and to reject the rest even if the part accepted is less than the amount set out in the contract. In other words, under all above systems the buyer has an unjustifiable option to treat the contract as an end and

⁸ See pp. 163-164, 168-178, ante.

⁹ See pp. 52-61, ante.

¹⁰ See p. 19, footnote 77, ante.

¹¹ See pp. 52-61, ante.

¹² See pp. 156-162, ante.

to sue the seller for its breach.¹⁴ The drafters of the CISG have also avoided this problem by requiring the buyer to accept the goods included in the contract and by granting him an option either to accept all or part of the excess in quantity and to pay for them at the contractual rate or to return them to the seller.¹⁵

Specific performance

As pointed out above, another method of maintaining the contract between the parties is to direct the breaching seller specifically to perform the contract between the parties. Under this method the seller is required either to repair the non-conformity in the goods to replace them provided that it does not cause unreasonable inconvenience to the buyer or to deliver substitute goods where it is impossible to carry out such a repair or where it causes unreasonable inconvenience to the buyer. Repair of the non-conformity in the goods delivered in this sense is the duty of the seller rather than a right on his part to restrict the buyer's right to reject.

As pointed out elsewhere, specific performance is the prime remedy of an aggrieved buyer under civilian systems, including those of Iran and France.¹⁶ In contrast with these systems, the aggrieved buyer under common law systems such as those in England and the US may only in certain circumstances obtain an order of specific performance as against the breaching seller.¹⁷ Moreover, there seems no provision under English and US law to require the breaching seller to repair the defects in the goods delivered when it is demanded by the aggrieved buyer. In other words, repair of the non-conformity under these system may only take place as the seller's right vis-à-vis the buyer rather than as his duty towards the latter.¹⁸

Non-availability of specific performance along with inadequacy of the damages recoverable by the aggrieved buyer in most instances particularly where the seller

¹³ See pp. 114-115, ante.

¹⁴ See pp. 20-22, 51-52, ante.

¹⁵ See pp. 152-153, ante.

¹⁶ See pp. 92-96, 122-127, ante.

¹⁷ See pp. 31-35, 76-79, ante.

¹⁸ *Ibid.*

deliberately breaches the contract¹⁹ are in fact the major factors which may discourage the seller from performing his duties in conformity with the contract under English and US law. Unfortunately, the drafters of the CISG failed to go far enough to obviate this problem for although the aggrieved buyer may demand for specific performance of the contract by the seller, the courts are not required to comply with this demand unless their respective domestic laws bind them to do so.²⁰ However, in accordance with Article 46(3) of the CISG, the aggrieved buyer in the case of a fundamental breach may demand that the breaching seller remedy the lack of conformity by repair unless this demand is unreasonable under the circumstances surrounding the case.

Balance of interests between the parties

Comparative study of the different legal systems under consideration reveals that every legal system contains various implied warranties which ascertain the quality of the goods to be delivered by the seller where there is no stipulation in this respect in the contract. The main goal of these warranties under each system is to strike a balance between the interests of the parties in a contract of sale. However, the extent of the success in achieving this goal under each system depends on both the implied warranties and the extent of the protection which they grant to the buyer.

As pointed out elsewhere,²¹ the Iranian civil law requires the seller to deliver goods which are both sound and commensurate with the contractual price. This requirement, together with the fact that both parties are bound to reveal to each other any defects which they knew before making of the contract, indicates that the extent of protection available to an aggrieved party under Iranian law is broader than its equivalent under the other legal systems under consideration. In fact, it seems that these provisions under the Iranian system maintain the balance of interests between the parties by precluding each one of them from luring the other into a bad bargain

¹⁹ See pp. 25-29, 30-31, 74-76, ante.

²⁰ See pp. 165-168, ante.

²¹ See pp. 281-285, ante.

through substantially overvaluing or undervaluing the goods sold or hiding the defects in them. Unlike the position under the Iranian system, there is no implied warranty under other legal systems under examination that the goods are price-worthy and as a result the buyer has no remedy as against the seller, if after the conclusion of the contract, he discovers that the price agreed between the parties is substantially higher than their market price at the time of the contract.²² Apart from this difference, the other implied protections afforded to the aggrieved buyer under Iranian law are also available to him under French law. This means that the seller under both Iranian and French law is under obligation both to reveal all the defects known to him at the time of the sale to the buyer and, in the absence of an agreement to the contrary, to deliver goods free from latent vices.²³ The seller's failure to reveal the defects in the goods will render him liable for any loss caused by the defects, including those of consequential damages even if, unlike English and US law, they were not reasonably foreseeable at the time of the contract²⁴ or the seller has disclaimed his liability for them by an otherwise rightful contractual clause.²⁵ The significance of this rule for the buyer becomes clearer when it is considered in the light of the Roman law principle of *spondet artis peritiam* which also applies to French law and under which a trader or a professional seller is assumed to know all the defects in the goods sold.²⁶ This provision, together with the fact that the scope of application of "the implied warranty against latent defects" under French law is wider²⁷ than its counterpart of "satisfactory" or "merchantable" quality under English and US law, indicate that the protection afforded to the buyer under the former system is significantly broader than those under English and US law. In fact, despite the gradual retreat of the common law maxim of *caveat emptor*, it still plays a paramount role in regulating the relationship between the parties under English and US law. This is because under English and US law, the seller has no liability for his failure either to disclose the defects known to him to the buyer at the time of the

²² Under English law, for example, see p. 183, ante.

²³ As to the French law, see pp. 259-262, ante.

²⁴ See pp. 267-272, ante.

²⁵ See pp. 261-262, ante.

²⁶ See pp. 101, 262, 268, 271, ante.

conclusion of the contract if they do not render the goods unmerchantable or unsatisfactory where the seller is a merchant who is selling the goods in the course of his business or to deliver price-worthy goods.²⁸ Moreover, under these systems the seller may exclude liability concerning his duty to deliver goods of satisfactory or merchantable quality by a contractual clause in an international sale.²⁹ He may do so even if at the time of making of the contract he knows that the goods are defective and that the defects in the goods render them unsatisfactory or unmerchantable within the law but declines to disclose these facts to the buyer.

These factors show that provisions of both the English and the US systems with regard to the quality of the goods to a large extent favour the seller, particularly in an international sale of goods. Despite the foregoing similarities between the English and US systems, there are also some major differences between these two systems concerning the implied warranties of quality under the terms of “satisfactory” and “merchantable” which have been respectively used by the English and US law. One of the main differences relates to the grade of the goods which the seller is to deliver where there are several grades of quality available in the market for the goods sold under a general description. In accordance with the US law, the requirement of “merchantability” under section 2-314(2) of the UCC means that the seller in the case of fungible goods is bound to deliver goods at least of “fair average quality” within the contract description,³⁰ whereas under English law, the goods delivered in such instances do not need to be of any particular grade of quality in order to comply with the requirement of “satisfactory” quality within the context of section 14 of the Sale of Goods Act 1979 (as amended).³¹ This means that the implied warranty of “merchantable” quality under US law is more favourable to the buyer than its counterpart “satisfactory” quality under English law.

The provisions of Article 35 of the CISG concerning the seller’s duty as to the quality of the goods delivered are almost identical with English law and as such they

²⁷ See pp. 102-104, ante.

²⁸ See pp. 182-183, 191-193, 245-248, ante.

²⁹ See p. 192, ante.

³⁰ See pp. 249-250, ante.

³¹ See pp. 203-204, ante.

are susceptible to the same criticisms as those of the latter system. This means that the seller will have no liability against the buyer if the quality of the goods delivered are not commensurate with the contractual price or if they suffer from some latent defects which, although not harmful for their ordinary use, substantially reduce the market value of the goods.³² Moreover, as in English law, the seller is not required to disclose to the buyer the latent defects which are known to him at the time of the conclusion of the contract. Nonetheless, unlike the position under US law, the aggrieved buyer in such instances is not barred from relying on the defect in the goods where he fails to give notice to the seller specifying the nature of the defect within a reasonable after he has discovered it, or ought to have discovered it, within the context of Article 39 of the CISG if the defect renders the goods unfit for any of their ordinary uses.³³ However, whether in such instances a contractual clause excluding the seller's liability concerning to those latent defects which distort the fitness of the goods for their ordinary uses is valid under the CISG is an issue which is not covered by the CISG and which is to be ascertained by reference to the provisions of the local law which govern to the contract under the rules of private international law of the forum where the case is being considered.³⁴ This raises the question of uniformity and diversity of the law with regard to the seller's duties between different legal systems and to what extent the drafters of the CISG have succeeded in obviating the problem of diversities among these systems and to bring about uniformity as the main goal of the CISG in an international sale of goods.

Diversity and uniformity of the law between different legal systems concerning the seller's duties in an international sale of goods

Our comparative examination also reveals that there are many similarities as well as differences between these systems with regard to the issue of the seller's duties in a contract of sale. Obviously, no problem may arise for the parties in an international

³² See p. 310-312, ante.

³³ CISG, Article 40. See further, pp. 177, 312-314, ante.

³⁴ See p. 331, ante.

sale where the provisions of all the legal systems are similar and unambiguous concerning a particular issue, even if the CISG contains no provision on this issue. The difficulty arises, however, where despite the similarity of these provisions under these systems they are ambiguous or where that particular issue is treated differently under different legal systems and the CISG either has no provision in this respect or its provisions do not properly address the issue.

Concerning the duty of delivery, all these systems agree on the assumption that, in the absence of a contractual stipulation to the contrary by the parties concerned, the seller must bear the expense of and incidental to putting the goods into a deliverable state while the expenses of taking delivery of the goods must be borne by the buyer.³⁵ Obviously, such a provision causes no problem for the parties in an international sale even though there is no equivalent provision under the CISG. Similarly, there seems to be no fundamental problem in the CISG with respect of the issue of the buyer's right to avoid the contract for non-conformity of the goods, their shortfall in quantity, their late or non-delivery since despite the short comings and the differences between the provisions of different legal systems in this respect, the CISG uniformly and unequivocally states that the buyer may avoid the contract only if the seller's breach is fundamental.³⁶ In the case of non-delivery, the seller's default constitutes fundamental breach only if he declines to deliver within the additional period of time fixed by the buyer in accordance with Article 47(1).³⁷ In the absence of a contrary agreement by the parties, the time of delivery under the CISG is not therefore, considered as constituting the essence of the contract. The buyer may not avoid the contract for non-delivery even if, in contrast with the position under English law,³⁸ the contract involves the carriage of goods by sea unless the buyer complies with the *Nachfrist* avoidance procedure under Article 47(1).³⁹

³⁵ See pp. 6, 36, 83, 109, ante.

³⁶ See pp. 168-176.

³⁷ *Ibid.*

³⁸ See pp. 12-17, ante.

³⁹ See pp. 168-169, ante.

The provisions of the CISG appropriately avoid the flaws in English, US and French law⁴⁰ concerning the issue of the excess in quantity of the goods delivered by requiring the buyer to accept the goods included in the contract and by giving him an option either to accept all or any part of the excess at the contractual rate.⁴¹ Although, in contrast with the Iranian law, the option under the CISG at the first glance appears to some extent to favour the buyer particularly, where the excess in quantity is significant and its market price is substantially higher than the contractual rate, but this option may be justified on the ground that, as noted above, the other provisions of the CISG considerably favours the seller's interests and that the return of the excess in an international sale is very costly for the seller.⁴²

Finally, the provisions of the CISG with respect of the seller's right to remedy address the issues of the differences between different legal systems under consideration and the existence of flaws in the provisions of the English and US law in this respect by allowing him to remedy only if it does not cause unreasonable inconvenience to the buyer irrespective of whether the remedy takes place before or after expiry of the time of performance of the contract.⁴³ Nonetheless, it is an open question under the CISG as to whether in the case of fundamental breach the buyer's right to avoid the contract or the seller's right to remedy the breach is to be given priority over the other.⁴⁴

Where the parties fail to set the time for delivery of the goods sold, some legal systems such as Iranian and Swedish law require the seller to deliver the goods immediately after conclusion of the contract. Of course the seller under these systems will have sufficient time to make delivery but that time may be very short in appropriate circumstances. The advantages of this approach are to release the seller from the risk of loss of the goods as soon as he can deliver them to the buyer and to give the buyer an opportunity to use the goods as he wishes thereafter.⁴⁵ In contrast with this approach, under English and US law the seller in the case of non-specified

⁴⁰ See pp. 18-22, 51-52, ante.

⁴¹ See pp. 152-156, ante.

⁴² *Ibid.*

⁴³ See pp. 156-162, ante.

⁴⁴ *Ibid.*

time for delivery may deliver only within a reasonable time after entering into the contract with the buyer.⁴⁶ In other words, the seller in such instances is liable for the breach of the contract if he insists on delivery of what is considered as an unreasonable early date if the buyer chooses not to accept such a delivery.⁴⁷ The provisions of the CISG do not seem to have gone far enough to obviate the problem which may arise for the parties in an international sale from the diversity of the civilian and the common law approaches in ascertaining of the time of delivery where there is no stipulation in this respect in the contract. This is because, although, like English and US law, where no time has been fixed by the parties in the contract, Article 33(c) of the CISG binds the seller to deliver “within a reasonable time after the conclusion of the contract”. This provision depending on whether it is applied in common law or civilian countries, is open to two different interpretations and as such it threatens to undermine the CISG’s main purpose which is to bring about uniformity at a world-wide level in the law of international sales contracts. The first interpretation relates to the courts in common law countries where the seller is liable for the breach of the contract if the time when the delivery takes place is regarded as unreasonably late or early, while under civilian systems the phrase “within a reasonable time” is most likely to be interpreted as to allow the seller to deliver within a shortest time as reasonably possible to make such delivery. As to the place of delivery, the provisions of the CISG⁴⁸ are generally similar to those of French, English and US law and accordingly, they are subject to the same criticisms as that of the latter systems. An open question under all these systems is how to determine the place of delivery where the goods sold are not specified and the seller has more than one place of business.⁴⁹ According to Article 10(a) of the CISG, the place of delivery in such instances is that:

⁴⁵ See pp. 110-114.

⁴⁶ Similarly, French law requires the seller to deliver within a reasonable time where there is no stipulation as to the time of delivery in the contract. See, *judgement of December 9, 1903*, Cour d’appel, Besançon, [1904] Gaz. Pal I 22. However, it is unclear whether the seller is in breach of the contract if he delivers the goods immediately after the conclusion of the contract.

⁴⁷ See pp. 47-48, ante.

⁴⁸ See pp. 141-148, ante.

⁴⁹ See pp. 144-145, ante.

“which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the time of the conclusion of the contract.”

Nonetheless, this provision does not completely obviate the foregoing problem, as the CISG does not clarify the meaning of the “closest relationship” in Article 10(a). This might be justified on the ground of the need for a certain degree of flexibility in the Article’s application in practice. However, the CISG’s reference to both “the contract and its performance” in this Article may create ambiguity. Suppose that the parties in State A enter into negotiation and conclude a contract under which the buyer undertakes to pay the price in State B where the seller has another place of business. The CISG does not give any indication as which of these places is to prevail for the purpose of delivery of the goods. To avoid such a problem under Article 10(a) of the CISG, the parties are recommended to specify in their contract the place where the goods are to be delivered.

The buyer’s right to obtain specific performance under CISG is another issue which threaten to undermine the CISG’s object in establishing uniformity and certainty in the law governing international sales. This is because under Article 28 of the CISG, the outcome of an action to obtain a decree of specific relief by the aggrieved buyer entirely depends on the geographical location of the trial court and on the discretionary view of an individual trial judges who considers the case.⁵⁰

Further disparity with respect to the application of the CISG’s provisions concerns the issue of validity which is excluded from the scope of the application of the CISG. As an example, in contrast with the US system, where a post sale warranty by the seller automatically modifies the terms of the contract between the parties,⁵¹ such a warranty under English law is valid only if it is supported by consideration by the buyer, while under some other legal systems such as Iranian law the post sale

⁵⁰ See pp. 165-168, ante.

⁵¹ See pp. 236-239, ante.

warranty may constitute an independent contract which binds the seller without any consideration on the part of the buyer.

In short, given the fact that there are many diversities between the provisions of the different legal systems and that it is hard if not virtually impossible for the parties in an international sale to know what effects these diversities may have on their respective interests in the contract, the introduction of the CISG is an admirable and remarkable step towards the achievement of a uniform set of provisions governing international contracts of sale of goods and towards the goal of reducing differences and uncertainties arising from the municipal rules of the private international law under various legal systems and bringing about certainty among the parties concerned.⁵² Nonetheless, exclusion of such important issues as validity of the formation of the contract or any of its provisions, inadequacy of the protection granted to the buyer for the seller's breach of the contract, the disparity of the law caused by the provisions of Article 20 of the CISG with respect of specific performance, and the ambiguity of the some of the CISG's provisions which may be interpreted differently under various legal systems are some of the major flaws which may undermine the foregoing goals.

⁵² See Johan Steyn, "A Kind of Esperanto" in *The Frontiers of Liability* (1994), vol.2 (P. Birks ed.) 11, 15.

Appendix I

The United States Uniform Sales Act 1903

Under section 11 of the Uniform Sales Act:

"(1) Where the obligation of either party to a contract to sell or a sale is subject to any condition which is not performed, such first-mentioned party may also treat the non-performance of the condition as a breach of warranty.

(2) Where the property in the goods has not passed, the buyer may treat the fulfilment by the seller of his obligation to furnish goods as described and as warranted expressly or by implication in the contract to sell as a condition of the obligation of the buyer to perform his promise to accept and to pay for the goods."

Under section 12 of the Uniform Sales Act:

"Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only shall be construed as a warranty."

Under section 14 of the Uniform Sales Act:

"Where there is a contract to sell or a sale of goods by description, there is an implied warranty that the goods shall correspond with the description and if the contract or sale by sample, as well as by the description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods did not also correspond with the description."

According to section 15 of the Uniform Sales Act:

"Subject to the provisions of this Act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows:

(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgement (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose.

(2) Where the goods are bought by description from a seller who deals in goods

of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of a merchantable quality.

(3) If the buyer has examined the goods, there is no implied warranty as regards defects, which such examination ought to have revealed.

(4) In the case of a contract to sell or a sale of specified article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose.

(5) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.

(6) An express warranty or condition does not negative a warranty or condition implied under this act unless inconsistent therewith."

Under section 16 of the Uniform Sales Act:

"Implied Warranties in sale by sample. In the case of a contract to sell or a sale by sample: (a) There is an implied warranty that the bulk shall correspond with the sample in quality. (b) There is an implied warranty that the buyer shall have a reasonable opportunity of comparing the bulk with the sample, except so far as otherwise provided in section 47(3)(c) If the seller is a dealer in goods of that kind, there is an implied warranty that the goods shall be free from any defect rendering them un-merchantable which would not be apparent on reasonable examination of the sample."

Under section 68 of the Uniform Sale Act:

"Where the seller has broken a contract to deliver specific or ascertained goods, a court having the powers of a court of equity may, if it thinks fit, on the application of the buyer, by its judgement or decree direct that the contract shall be performed specifically, without giving the seller the option of retaining the goods on payment of damages. The judgement or decree may be unconditional, or upon such terms and conditions as to damages, payment of the price and otherwise, as to the court may seem just."

Under section 69 of the Uniform Sales Act:

"(1) Where there is a breach of warranty by the seller, the buyer may, at his election- (a) Accept or keep the goods and set up against the seller, the breach of warranty by way of recoupment in diminution or extinction of the price; (b) Accept or keep the goods and maintain an action against the seller for damages for the breach of warranty; (c) Refuse to accept the goods, if the property therein has not passed, and maintain an action against the seller for damages for the breach of the warranty; (d) Rescind the contract to sell or the sale and refuse to receive the goods, or if the goods have already been received, return them or offer to return them to the seller and recover the price or any part thereof which has been paid.

(2) When the buyer has claimed and been granted a remedy in any one of these ways, no other remedy can thereafter be granted."

The United States Uniform Commercial Code (UCC)

Under section 2-103(1)(b) of the UCC:

“‘Good faith’ in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.”

Under section 2-309(1) of the UCC:

“The time for shipment or delivery or any other action under a contract if not provided in this Article or agreed upon shall be a reasonable time.”

Under section 2-309(2) of the UCC:

“Where the contract provides for successive performance but is indefinite in duration it is valid for a reasonable time but unless otherwise agreed may be terminated at any time.”

Under section 2-309(3) of the UCC:

“Termination of a contract by one party except on the happening of an agreed event requires that reasonable notification be received by the other party and an agreement dispensing with notification is invalid if its operation would be unconscionable.”

Under section 2-320 of the UCC:

“Due tender by the seller requires that he comply with the requirements of the Uniform Commercial Code sections governing shipment contracts and, in the case of a destination contract due tender requires physical delivery of the goods at the destination specified in the contract.”

Under section 2-503 of the UCC:

“(1) Tender of delivery requires that the seller put and hold conforming goods at the buyer’s disposition and give the buyer any notification reasonably necessary to enable him to take delivery. The manner, time and place for tender are determined by the agreement and this Article, and in particular

(a) tender must be at a reasonable hour, and if it is of goods they must be kept available for the period reasonably necessary to enable the buyer to take possession; but

(b) unless otherwise agreed the buyer must furnish facilities reasonably suitable to the receipt of the goods.”

Under section 2-503(5) of the UCC:

“Where the contract requires the seller to deliver documents (a) he must tender all

such documents in correct form, except as provided in this Article with respect to bills of lading in a set (subsection (2) of section 2-323); and (b) tender through customary banking channels is sufficient and dishonour of a draft accompanying the documents constitutes non-acceptance or rejection.”

Under section 2-504 of the UCC:

“Where the seller is required or authorised to send the goods to the buyer and the contract does not require him to deliver them at a particular destination, then unless otherwise agreed he must

(a) put the goods in the possession such a carrier and make such a contract for their transportation as may be reasonable having regard to the nature of the goods and other circumstances of the case; and

(b) obtain and promptly deliver or tender in due form any document necessary to enable the buyer to obtain possession of the goods or otherwise required by the agreement or by usage of trade; and

(c) promptly notify the buyer of the shipment.

Failure to notify the buyer under paragraph (c) or to make a proper contract under paragraph (a) is a rejection only if material delay or loss ensues.”

Under section 2-508(1) of the UCC,

“Where any tender or delivery by the seller is rejected because non-conforming and the time for performance has not yet expired, the seller may seasonably notify the buyer of his intention to cure and may then within the contract time make a conforming delivery.”

Under section 2-508(2) of the UCC:

“Where the buyer rejects a non-conforming tender which the seller had reasonable grounds to believe would be acceptable with or without money allowance the seller may if he seasonably notifies the buyer have a further reasonable time to substitute a conforming tender.”

Under section 2-711(1) of the UCC:

“Where the seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance then with respect to any goods involved, and with respect to the whole if the breach goes to the whole contract (section 2-612), the buyer may *cancel* and whether or not he has done so may *in addition to recovering so much of the price as has been paid ...*” (emphasis added)

Under section 2-612(1) of the UCC:

“An ‘instalment contract’ is one which requires or authorises the delivery of goods in separate lots to be separately accepted, even though the contract contains a clause ‘each delivery is a separate contract’ or its equivalent.”

Under section 2-612(3) of the UCC :

“Whenever non-conformity or default with respect to one or more instalment

substantially impairs the value of the whole contract there is a breach of the whole. But the aggrieved party reinstates the contract if he accepts a non-conforming instalment without seasonably notifying of cancellation or if he brings an action with respect only to past instalments or demands performance as to the future instalments.”

Under section 2-714 of the UCC:

“Where the buyer accepted goods and given notification (sub-section (3) of section 2-607) he may recover as damages for any non-conformity of tender the loss resulting in ordinary course of events from the seller’s breach as determined in any manner which is reasonable.”

Under sections 2-723(2) and (3) of the UCC:

“(2) If evidence of a price prevailing at the times or places described in this Article is not readily available the price prevailing within any reasonable time before or after the time described or at any other place which in commercial judgement or under usage of trade would serve as a reasonable substitute for the one described may be used, making any proper allowance for the cost of transporting the goods to or from such other place.

(3) Evidence of a relevant price prevailing at the time or place other than the one described in this Article offered by one party is not admissible unless and until he has given the other party such notice as the court finds sufficient to prevent unfair surprise.”

Official Comment to Uniform Commercial Code

Under Comment 4 to section 2-308 of the UCC:

“... The surrounding circumstances, usage of trade, course of dealing and course of performance, as well as the express language of the parties, may constitute an “otherwise agreement”.

Under Comment 4 to section 2-309 of the UCC:

“When the time for delivery is left open, unreasonably early offers of or demands for delivery are intended to be read under this Article as expressions of desire or intention, requesting the assent or acquiescence of the other party, not as final positions which may amount without more to breach or to create breach by the other side. See Sections 2-207 and 2-609.”

Under Comment 3 to section 2-313 of the UCC:

“In actual practice affirmations of fact made by the seller about the goods during a bargain are regarded as part of the description of the goods; hence no particular reliance on such statements need be shown in order to weave them into the fabric of the agreement. Rather, any fact which is to take such

affirmations, once made, out of the agreement requires clear affirmative proof. The issue is normally is one of the fact."

Under Comment 7 to section 2-313 of the UCC provides:

"The precise time when words of description or affirmation are made or sample are shown is not material. The sole question is whether the language or samples or models are fairly to be regarded as part of the contract. If language is used after the closing of the deal (as when the buyer when taking delivery asks and receives an additional assurance), the warranty becomes a modification if it is otherwise reasonable and in order (section 2-209)."

Under Comment 8 to Section 2-314 of the UCC:

"[P]rotection, under this aspect of the warranty, of the person buying for resale to the ultimate consumer is equally necessary, and merchantable goods must therefore be "honestly" resalable in the normal course of business because they are what they purport to be."

Under Official Comment 2 to section 2-508 of the UCC:

"Such reasonable grounds can lie in prior course of performance or usage of trade as well as in particular circumstances surrounding the making of the contract. The seller is charged with commercial knowledge of any factors in a particular sales situation which require him to comply strictly with his obligations under the contract as, for example, strict conformity of documents in an overseas shipment or the sale of precision parts or chemicals for use in manufacture. Further, if the buyer gives notice either implicitly, as by a prior course of dealing involving rigorous inspections, or expressly, as by the deliberate inclusion of a 'no replacement' clause in the contract, the seller is to be held to rigid compliance. If the clause appears in a 'form' contract evidence that is out of line with trade usage or the prior course of dealing and was not called to seller's attention may be sufficient to show that the seller had reasonable grounds to believe that the tender would be acceptable."

Under Comment 2 to section 2-608 of the UCC:

"[T]he question is whether the non-conformity is such as will in fact cause a substantial impairment of value to the buyer though the seller had no advance knowledge as to the buyer's particular circumstances

Under Official Comment 2 to section 2-715 of the UCC:

"Subsection (2) operates to allow the buyer, in an appropriate case, any consequential damages which are the result of the seller's breach. The 'tacit agreement' test for the recovery of consequential damages is rejected."

Appendix II

The United Kingdom Sale of Goods Act 1979

Under section sections 11 (2), (3) of the Sale of Goods Act 1979:

"(2) Where a stipulation in contract of sale is subject to a condition to be fulfilled by the seller, the buyer may waive the condition, or may elect to treat the breach of the condition as a breach of warranty and not as a ground for treating the contract as repudiated.

(3) Whether a stipulation in a contract of sale is a condition, the breach of which may give rise to a right to treat the contract as repudiated, or a warranty, the breach of which may give rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated, depends in each case on the construction of the contract; and a stipulation may be a condition, though called a warranty in the contract."

Under section 11(4) of the Sale of Goods Act 1979:

"Where a contract of sale is not severable and the buyer has accepted the goods or part of them, the breach of a condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, unless there is an express or implied term of the contract to that effect."

Under section 13 of the Sale of Goods Act 1979 (as amended):

"(1) Where there is a contract for the sale of goods by description, there is an implied term that the goods correspond with the description.

(2) If the sale is by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

A sale of goods is not prevented from being a sale by description by reason only that, being exposed for sale or hire, they are selected by the buyer."

Under sections 14(2A) and 14(2B) of the Sale of Goods Act 1979(as amended):

"(2A) Goods are of satisfactory quality if they meet the standard that a reasonable person would regard as satisfactory, taking account of any description of the goods, the price (if relevant) and all the other relevant circumstances.

(2B) The quality of goods includes their state and condition and the following (among others) are in appropriate cases aspects of the quality of goods-

(a) fitness for all purpose for which goods of the kind in question are commonly supplied,

(b) appearance and finish,

(c) freedom from minor defects,

- (d) safety, and
- (e) Durability.”

Under section 14 (2C) of the Sale of Goods Act 1979 (as amended):

“The term implied by subsection (2) above does not extend to any matter making the quality of goods unsatisfactory -
(a) which is specifically drawn to the buyer’s attention before the contract is made,
(b) where the buyer examine the goods before the contract is made, which that examination ought to reveal, or
in the case of a contract for sale by sample, which would have been apparent on reasonable examination of the sample.”

Under section 14(1) of Sale of Goods Act 1979:

“Except as provided by this section and section 15 below and subject to any other enactment, there is no implied condition or warranty about the quality or fitness for any particular purpose of goods supplied under a contract of sale.”

Under section 14(2) of the Sale of Goods Act 1979 (as amended):

“Where the seller sells goods in the course of a business, there is an implied term that the goods supplied under the contract are of satisfactory quality.”

Under section 14(3) of the Sale of Goods Act 1979:

“Where the seller sells goods in the course of business and the buyer, expressly or by implication, makes known-
(a) to the seller, or
(b) where the purchase price or part of it is payable by instalment and the goods were previously sold by a credit-broker to the seller, to that credit-broker, any particular purpose for which the goods are being bought, there is an implied condition that the goods supplied under the contract are reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied, except where the circumstances show that the buyer does not rely, or that it is unreasonable for him to rely, on the skill or judgement of the seller or credit-broker.”

Under section 14(5) of the Sale of Goods Act 1979:

“The preceding provisions of this section apply to a sale by a person who in the course of a business is acting as agent for another as they apply to a sale by a principal in the course of business, except where that other is not selling in the course of business and either the buyer knows that fact or reasonable steps are taken to bring it to the notice of the buyer before the contract is made.”

Under section 14(6) of the Sale of Goods Act 1979:

“Goods of any kind are of merchantable quality within the meaning of subsection (2) above if they are as fit for the purpose or purposes for which goods of that kind are commonly bought as it is reasonable to expect having regard to any description applied to them, the price (if relevant) and all the other relevant circumstances.”

Under section 15 of the Sale of Goods Act 1979:

"(1) A contract of sale is a contract for sale by sample where there is a term in the contract, express or implied, to that effect.

(2) In the case of a contract for sale by sample (a) There is an implied condition that the bulk will correspond with the sample in quality; (b) There is an implied condition that the buyer will have a reasonable opportunity of comparing the bulk with the sample; (c) There is an implied condition that the goods will be free from any defect, rendering them un-merchantable, which would not be apparent on reasonable examination of the sample."

Under section 27 of the Sale of Goods Act 1979:

"It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract of sale."

Under section 29(1) of the Sale of Goods Act 1979:

"Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties."

Under section 29(3) of the Sale of Goods Act 1979:

"Where under the contract of sale the seller is bound to send the goods to the buyer, but no time for sending them fixed, the seller is bound to send them within a reasonable time."

Under section 29(6) of the Sale of Goods Act 1979:

"Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state must be borne by the seller."

Under section 30(2A)(a) of the Sale of Goods Act 1979(as amended):

"A buyer who does not deal as consumer may not-

(a) where the seller delivers a quantity of goods less than he contracted to sell reject the goods under subsection above if the shortfall,...is so slight that it would be unreasonable for him to do so."

Under section 31(2) of the Sale of Goods Act 1979:

"Unless otherwise authorised by the buyer, the seller must make such contract with the carrier *on* behalf of the buyer as may be reasonable having regard to the nature of the

goods and other circumstances of the case; and if the seller omits to do so, and the goods are lost or damaged in the course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself or may hold the seller responsible in damages.”

Under section 32(1) of the Sale of Goods Act 1979:

“Where, in pursuance of a contract of sale, the seller is authorised or required to send the goods to the buyer, delivery of the goods to a carrier (whether named by the buyer or not) for the purpose of transmission to the buyer is *prima facie* deemed to be delivery of the goods to the buyer.”

Under section 34 of the Sale of Goods Act 1979 (as amended):

“(1) A contract of sale is a contract for sale by sample where there is an express or implied term to that effect in the contract.
(2) In the case of contract for sale by sample there is an implied term
(a) that the bulk will correspond with the sample in quality;
(b) that the buyer will have reasonable opportunity of comparing the bulk with the sample [this subsection has been repealed by the Sale and Supply of Goods act 1994 but the equivalent provision is now to be found in section 35(2)(a)];
(c) that the goods will be free from any defect, making their quality unsatisfactory.”

Under section 41 of the Sale of Goods Act 1979:

“(1) subject to this Act, the unpaid seller of the goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases:
(a) where the goods have been sold without any stipulation as to credit;
(b) where the goods have been sold on credit but the term of credit has expired;
(c) where the buyer becomes insolvent.
(2) The seller may exercise his right of retention notwithstanding that he is in possession of the goods as agent or bailee or custodian of the buyer.”

Under section 51(1) of the Sale of Goods Act 1979:

“Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damage for non-delivery.”

Under section 52(1) of the Sale of Goods Act 1979:

“In any action for breach of contract to deliver specific or ascertained goods the court may, if it thinks fit, on the plaintiff’s application, by its judgement or decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages.”

Under sections 53 (1), (4) of the Sale of Goods Act 1979:

“(1) Where there is a breach of warranty by the seller, or where the buyer elects (or is compelled) to treat any breach of the condition on the part of the seller as a

breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods; but he may-

(a) set up against the seller the breach of warranty in diminution or extinction of the price, or

b) maintain an action against the seller for damages for the breach of warranty.

(4) The fact that the buyer has set up the breach of warranty in diminution or extinction of the price does not prevent him from maintaining an action for the same breach of warranty if he suffered further damages.

Under section 61(1)(b) of the Sale of Goods Act 1979:

"'Warranty' (as regards England and Wales and Northern Ireland) means an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated."

Appendix III

The French Civil Code

Under Article 422 of the French Civil Code:

"If after the transaction it is transpired that the property sold was defective, the buyer has the option either to accept the defective property together with compensation for its defect, or to cancel the transaction."

Under Articles 1116, 1117 of the French Civil Code:

"There is no valid consent if the consent has only been given by error or if it has been obtained by violence or procured by fraud. A contract entered into by error, violence, or fraud is not void, as a matter of right; it only gives rise to an action for avoidance or rescission ..."

Under Article 1149 of the French Civil Code:

"The damages due to the obligee are, in general, for the loss which he has sustained and for the benefit of which he has been deprived, subject to the expectations and modification hereinafter set forth."

Under Article 1150 of the French Civil Code:

"The obligor [the seller] is liable only for the damages foreseen or which could have been foreseen at the time of the contract, so long as it is not to his fraud that the obligation has not been performed."

Under Article 1151 of the French Civil Code:

"Even in the case where non-performance of the agreement is due to the fraud of the obligor, the damages may include only that portion of the loss sustained by the obligee and of the benefit of which he was deprived, which is the immediate and direct consequence of the non-performance of the agreement."

Under Article 1247 of the French Code:

"(1) Payment must be made at the place designated by the agreement. If the place is not thereby designated, payment in the case of definite and specified object, must be made at the place where the thing forming the subject matter of the obligation was at the time the obligation was contracted."

- (2) Alimony (aliment) allowed by a court must be paid, except where the judge renders a contrary decision, at the domicile or the residence of the one who is to receive it
- (3) Except for these cases, payment must be made at the domicile of the debtor."

Under Article 1382 of the French Code :

"Every act whatever of an individual which causes injury to another obliges him by whose fault it happened to repair it."

Under Article 1383 of the French Civil Code:

"Every one is responsible for the injury which he has caused not only by his act, but by his negligence or imprudence."

Under Article 1604 Of the French Civil Code:

"He [the seller] has two principal obligations, one to deliver and the other to warrant the thing which he is selling."

Under Article 1604 of the French Code:

"The delivery of personal effects takes place:
Either by actual transfer, or by handing over the keys to the buildings which contains them, or even by mere consent of the parties, if the transfer cannot be made at the time of the sale, or if the buyer has already acquired control in another manner."

Under Article 1609 of the French Civil Code:

"Delivery must be made at the place where the thing sold was at the time of the sale, if no other place has been agreed upon."

Under Article 1611 of the French Civil Code,:

"In all cases, the seller must be ordered to pay damages if injury has been caused to the buyer by failure to make delivery within the time agreed upon."

Under Article 1612 of the French Civil Code:

"The seller is not bound to deliver the thing if the buyer fails to pay the price, and the seller has not granted him an extension of time for payment."

Under Article 1615 Of the French Civil Code:

"The obligation to deliver a thing includes its accessories and all things associated with its permanent use."

Under Article 1642 of the French Civil Code:

"A vendor is not responsible for apparent defects which the purchaser has been able to ascertain for himself".

Appendix IV

Iranian Civil Code

Under Article 10 of the Iranian Civil Code:

“Private contracts shall be binding on those who have signed them, providing they are not in the contradiction of the explicit provisions of a law.”

Under Article 226 of the Iranian Civil Code:

“In the event of non-performance of undertakings by one of the parties under the contract, the other party cannot claim damages for loss sustained, unless a specified period has been set for performance of the undertaking and that period was expired. If no period was provided for the performance of the undertakings a party can only claim damages if he was given a right to fix the period for fulfilment of the obligations.”

Under Article 230 of the Iranian Civil Code:

“Where in a contract the amount of the compensation to be paid in the event of its non-performance is stipulated, the court may not condemn the party in breach to pay more or less than the sum fixed.”

Under Article 233 of the Iranian Code:

“The following conditions are of no effect and will nullify the contract itself:

1. Conditions which are contrary to the contract’s requirements.
2. Conditions which are unknown and of which lack of knowledge entails ignorance of the consideration.”

Under Article 235 of the Iranian Code:

“Where in a contract it transpires that the condition of description provided by the parties is absent, the party in whose benefit the condition has been provided shall have the right to cancel the contract.”

Under Article 279 of the Iranian Civil Code:

“ If the subject matter of the contract to be delivered is not specified article but is of a general nature, an obligor under the contract is not bound to deliver an article of the best quality, but must not hand over an article which according to custom and usage is considered defective.”

Under Article 282 of the Iranian Civil Code:

“If one of the parties to a contract owes several sums to the other party, the former shall decide on what count any particular payment is made.”

Under Article 331 of the Iranian Civil Code:

“A person who causes a property to be destroyed is liable to give back its equivalent or its value, and if he causes a defect or damage to it he must pay compensation for any depreciation in its value.”

Under Article 341 of the Iranian Civil Code:

“A contract of sale between the parties may be made with or without any conditions *and also it may contain a term for delivery of the whole or part of the thing sold* or of the total or partial payment of its consideration.” (Italic added).

Under Article 342 of the Iranian Code:

The quality, type and description of the thing sold must be known and the fixing of the quality by weight, measure, number, length, area, or by inspection is made in conformity with the local custom and usage.”

Under Article 351 of the Iranian Civil Code:

“In the case of a sale of goods of general nature, i.e. where they can be specified from numerous units, the sale is valid only if it stipulates for the goods’ quantity, quality and description.”

Under Article 353 of the Iranian Civil Code:

“If a specified chattel belonging to a special category is sold and it is found that the chattel delivered does not belong to such category the sale is void, and if a part of the chattel sold is not up to quality then that part of the sale is void and the buyer has also the right to cancel the remainder of the deal.”

Under Article 356 of the Iranian Civil Code:

“Anything which according to a common usage and practice should form part of the article sold or is regarded as an attachment to it or which is indicated to be part of the article forms part of the sale and belongs to the buyer, even if this has not been clearly stated in the contract of sale by the parties and even if it was known to them at the time of the contract.”

Under Article 362 of the Iranian Civil Code:

“The following conditions are of no effect and will nullify the contract itself:
1- Conditions which contradict with the requirement of a contract.
2- Conditions which are unknown and of which lack of knowledge entails ignorance of the consideration.”

Under Article 362(3) of the Iranian Civil Code:

“A contract of sale makes the seller responsible for delivery of the thing sold.”

Under Article 368 of the Civil Code:

“The delivery takes place when the thing sold is placed at the disposal of the purchaser even if the latter has not actually taken physical possession of it.”

Under Article 373 of the Iranian Civil Code:

“When the goods sold are already in the possession of the buyer a fresh delivery is not necessary; the same applies to their consideration in the contract of sale.”

Under Article 374 of the Iranian Civil Code:

“For taking possession of the goods no authorisation is necessary and the buyer can take their possession without any authorisation.”

Under Article 375 of the Iranian Civil Code:

“Delivery of the goods must be effected at the place where the contract was made, unless other place is required by common usage or unless a special place has been provided in the contract of sale for the delivery.”

Under Article 376 of the Iranian Civil Code:

“ In the event of delay in delivering the goods sold or of their price, the party in default will be forced to perform his duty under the contract.”

Under Article 378 of the Iranian Civil Code:

“The seller cannot reclaim the goods which have been voluntarily delivered by him except in the case of the cancellation of the transaction where he has been given the option to do so.”

Under Article 378 of the Iranian Civil Code:

“For taking possession of the goods, no authorisation is necessary. The buyer can take possession of the goods purchased without any authorisation.”

Under Article 380 of the Iranian Civil Code, :

“In the event of the bankruptcy of the buyer, if he has retained in his possession the actual object of the sale, the seller may reclaim it and he may decline to deliver if he has not done so.”

Under Article 381 of the Iranian Civil Code:

“The responsibility for cost of delivery of the goods, such as the expense of their transportation to the place of delivery, cost of counting, weighing of them and so on are placed on the seller, whilst the expense of payment of the contractual price is to be met by the buyer.”

Under Article 383 of the Iranian Civil Code:

“The delivery by the seller should contain all elements which are the parts and appurtenances of the thing sold.”

Under Article 384 of the Iranian Civil Code:

“If at the time of the contract the quantity of the goods sold are fixed but less than this quantity are delivered to the buyer, he will have a choice to cancel the sale or to take the quantity of the goods delivered and to pay for them at the contract rate. If the quantity of the goods delivered is more than the contractually fixed amount, the excess belongs to the seller.”

Under Article 386 of the Iranian Civil Code:

“In the case of cancellation of the contract for failing to deliver the agreed quantity of the goods by the seller, he must refund, over and above the price any costs of the contract and reasonable expenses incurred by the buyer.”

Under Article 387 of the Iranian Civil Code:

“If without fault or neglect on the part of the seller the thing sold perishes before delivery, the sale will be cancelled and the price is to be returned back to the purchaser unless the seller has already applied to a magistrate or his substitute for the enforcement of the delivery, in which case the loss will be borne by the purchaser.”

Under Article 389 of the Iranian Civil Code:

“If under the circumstances described in the above two articles the loss of goods or their deterioration in value is caused by the buyer’s act, he will have no claim against the seller whilst he must pay the contractual price to him.”

Under Article 413 of the Iranian Civil Code:

“If one of the parties to the transaction has previously seen the property and makes the transaction on the basis of his previous inspection and if it transpires, after the inspection, that the said property does not possess the qualities which it previously

had, he shall have the right of cancelling the transaction.”

Under Article 414 of the Iranian Civil Code:

“In a sale of merchandise of a general description there is no Option of Inspection [in the buyer] and the vendor is to deliver goods which are in conformity with the descriptions agreed between the parties.”

Under Article 416 of the Iranian Civil Code:

“Either of the parties to a transaction if he has suffered (gross loss) may, after being appraised of the lesion, cancel the transaction.”

Under Article 418 of the Iranian Civil Code:

“If the party who has sustained loss knows, at the time of the transaction, the proper price of the object of the sale, he will have no right of cancellation.”

Under Article 42 of the Iranian Civil Code:

“If the party to a contract who has deceived his counterpart delivers the difference in price, the Option of Loss does not extinguish unless the aggrieved party agrees to receive the difference in price.”

Under Article 424 of the Iranian Civil Code:

“An inherent defect is one which is known to the buyer, whether this ignorance arose from the fact that the defect was really latent, or whether the defect was evident but the buyer did not realise that fact.”

Under Article 431 of the Iranian Civil Code:

“Where several things are sold in one transaction in such way that the price of each one is not separately fixed, the buyer may either return all of them and recover the price or retain all of them and take compensation but he cannot make any discrimination except with the consent of the seller.”

Under Article 434 of the Iranian Civil Code:

“If it is transpired that the defective thing sold has in actual fact no proprietary worth and no price, the sale is void; and if a part of the thing is worthless, the sale in respect of that part is void and purchaser has, in respect of the remainder, a right of cancellation in consideration of the Option of Sales Unfulfilled in part.”

Under Article 439 of the Iranian Civil Code:

“In the case of fraud by the vendor as to the thing sold, the vendee will have a right to cancel the sale, and similarly the vendor may cancel the sale where the vendee

practice fraud concerning the price paid by him.”

Under Article 441 of the Iranian Civil Code:

“The option of sales unfulfilled in part arises where the deal, in respect of a part of the goods sold, is void for any reason in which case the buyer has an option to cancel the deal or to accept that part of the goods in respect of which the deal is valid and to refund the consideration for the remaining part of the goods in respect of which the deal was invalid.”

Under Article 448 of the Iranian Civil Code:

“Some or all of the Options may be forfeited as a condition inserted in the contract of sale.”

Iranian Law of Civil Procedure

Under Article 729 of the Iranian Law of Civil Procedure:

“Where the object of the obligation is an action which can be done only by the obligor, the court may at the request of the obligee issue an order instructing the former to pay a fixed sum to the latter for each day if he fails to implement the obligation within the period of time specified in the order.”

Under Article 728 of the Iranian Law Civil Procedure:

“The court will hold the obligor to pay compensation only if the claimant/obligee proves that he has suffered a loss and that the loss is directly caused by non-performance or delay in performance of the contract by the former or by his failure to deliver the thing which under the court’s order has to be delivered to the latter. The damages may resulted from the actual loss of property or from the loss of profits which the obligee may have gained if the obligation was performed by the obligor.”

Appendix V

Vienna Convention for International Sale of Goods 1980 (CISG)

Under Article 7 of the CISG:

“(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.”

Under Article 9 of the CISG:

“(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.

(2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.”

Under Article 25 of the CISG:

“A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.”

Under Article 28 of the CISG:

“a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention.”

Under Article 32(2) of the CISG:

“If the seller is bound to arrange for carriage of the goods, he must make such contracts as are necessary for carriage to the place fixed by means of transportation appropriate in the circumstances and according to the usual terms for such transportation.”

Under Article 34 of the CISG:

“If the seller is bound to hand over documents relating to the goods, he must hand them over at the time and place and in the form required by the contract. If the seller has handed over documents before that time, he may, up to that time, cure any lack of conformity in the documents, if the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided in this Convention.”

Under Article 35(1) of the CISG:

“The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.”

Under Article 35 (3) of the CISG:

“ The seller is not liable under sub-paragraphs (a) to (d) of the preceding paragraph for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity.”

Under Article 36 of the CISG:

“(1) The seller is liable in accordance with the contract and this Convention for any lack of conformity which exists at the time when the risk passes to the buyer, even though the lack of conformity becomes apparent only after that time.

(2) The seller is also liable for any lack of conformity which occurs after the time indicated in the preceding paragraph and which is due to a breach of any of his obligations, including a breach of any guarantee that for a period of time the goods will remain fit for their ordinary purpose or for some particular purpose or will retain specified qualities or characteristics.”

Under Article 37 of this CISG:

“If the seller has delivered the goods before the date for delivery, he may, up to that date, deliver any missing part or make up any deficiency in the quantity of the goods delivered or remedy any lack of conformity in the goods delivered, provided that the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided for in this Convention.”

Under Article 39 of the CISG:

“(1) The buyer loses the right to rely on lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.

(2) In any event, the buyer loses the right to rely on a lack conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the

buyer, unless this time-limit is inconsistent with a contractual period of guarantee.”

Under Article 40 of the CISG:

“The seller is not entitled to rely on the provisions of articles 38 and 39 if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer”

Under Article 42(1) of the CISG:

“(1) The seller must deliver goods which are free from any right or claim of a third party based on industrial property or other intellectual property, or which at the time of the conclusion of the contract the seller knew or could not have been unaware, provided that the right or claim is based on industrial property or other intellectual property:

(a) under the law of the State where the goods will be resold or otherwise used, if it was contemplated by the parties at the time of the conclusion of the contract that the goods would be resold or otherwise used in that State; or
in any other case, under the law of the State where the buyer has his place of business.”

Under Article 44(1) of the Draft Convention:

“Unless the buyer has declared the contract avoided in accordance with Article 45, the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations, if he can do so without such delay as will amount to a fundamental breach of the contract and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer. The buyer retains any right to claim damages as provided for in this Convention.”

Under Article 45 of the CISG:

“(1) If the seller fails to perform any of his obligations under the contract or this Convention, the buyer may:

(a) exercise the rights provided in articles 46 to 52;

(b) claim damages as provided in article 74 to 77.

(2) the buyer is not deprived of any right he may have to claim damages by exercising his right to other remedies.

(3) No period of grace may be granted to the seller by a court or arbitral tribunal when the buyer resorts to a remedy for breach of contract.”

Under Article 46(2) of the CISG:

“If the goods do not conform with the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach of contract and a request for substitute goods is made either in conjunction with notice given under article 39 or within reasonable time thereafter.”

Under Article 46(3) of the CISG:

“If the goods do not conform with the contract, the buyer may require the seller to remedy the lack of conformity by repair, unless this is unreasonable having regard to all the circumstances. A request for repair must be made either in conjunction with notice given under Article under article 39 or within a reasonable time thereafter.”

Under Article 48(1) of the CISG:

“Subject to Article 49, the seller may, even after the date for delivery, remedy at his expenses any failure to perform his obligations, if he can do so without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer. However, the buyer retains any right to claim damages as provided for in this Convention.”

Under Article 49 of the CISG:

“(1) The buyer may declare the contract avoided

- (a) if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of the contract; or
- (b) in the case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of Article 47 or declares that he will not deliver within the period so fixed.

(2) However, in cases where the seller has delivered the goods, the buyer loses the right to declare the contract avoided unless he does so:

- (a) in respect of late delivery, within a reasonable time after he has become aware that delivery has been made;
- (b) in respect of any breach other than late delivery, within a reasonable time:
 - (i) after he knew or ought to have known of the breach;
 - (ii) after the expiration of any additional period of time fixed by the buyer in accordance with paragraph (1) of Article 47, or after the seller has declared that he will not perform his obligations within such an additional period; or
 - (iii) after the expiration of any additional period of time indicated by the seller in accordance with paragraph 2 of Article 48, or after the buyer has declared that he will not accept performance.”

Under Article 51(1) of the CISG:

“If the seller delivers only part of the goods or if only part of the goods delivered is in conformity with the contract, Articles 46 to 50 apply in respect of the part which is missing or which does not conform.”

Under Article 51(2) of the CISG:

“ The buyer may declare the contract avoided in its entirety only if the failure to make delivery completely or in conformity with the contract amounts to a fundamental breach of the contract.”

Under Article 66 of the CISG:

“Loss of or damage to the goods after the risk has passed to the buyer does not

discharge him from his obligation to pay the price, unless the loss or damage is due to an act or omission of the seller.”

Under Article 69 of the CISG:

“(1) In cases not within article 67 and 68, the risk passes to the buyer when he takes over the goods or, if he does not do so in due time, from the time when the goods are placed at his disposal and he commits a breach of contract by failing to take delivery.

(2) However, if the buyer is bound to take over the goods at a place other than the place of business of the seller, the risk passes when delivery is due and the buyer is aware of the fact that the goods are placed at his disposal at that place.

(3) If the contract relates to goods not then identified, the goods are considered not to be placed at the disposal of the buyer until they are clearly identified to the contract.”

Under Article 73 of the CISG:

“(1) In the case of a contract for delivery of goods by instalments, if the failure of one party to perform any of his obligations in respect of any instalment constitutes a fundamental breach of contract with respect to that instalment, the other party may declare the contract avoided with respect to that instalment.

(2) If one party’s failure to perform any of his obligations in respect of any instalment gives the other party good grounds to conclude that a fundamental breach of contract will occur with respect to future instalments, he may declare the contract avoided for the future, provided that he does so within a reasonable time.”

Under Article 74 of the CISG:

“Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.

Under Article 75 of the CISG:

“If the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction as well as any further damages recoverable under article 74.”

Under Article 76 of the CISG:

“(1) If the contract is avoided and there is a current price for the goods, the party claiming damages may, if he has not made a purchase or resale under Article 75, recover the difference between the price fixed by the contract and the current price at the time of avoidance as well as any further damages recoverable under Article 74. If, however, the party claiming damages has avoided the contract after taking over the goods, the current price at the time of such taking over shall be applied instead of the current price at the time avoidance.

(2) For the purpose of the preceding paragraph, the current price is the price prevailing at the place where delivery of the goods should have been made or, if there is no current price at that place, the price at such other place as serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods."

Under Article 77 of the CISG:

"A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been prevented."

Under Article 81(1) of the CISG:

"Avoidance of the contract releases both parties from their obligations under it, subject to any damages which may be due. Avoidance does not affect any provision of the contract for the settlement of the contract governing the rights and obligations of the parties consequent upon the avoidance of the contract."

Italian Civil Code

Under Article 1490 of the Italian Civil Code:

"A seller is bound to warrant that the thing sold is free of defects which render it unfit for the use for which it was intended or which appreciably diminish its value."

German Civil Code

Under Article 460 of BGB:

"In the absence of express warranty the vendor is under no liability for defects which the buyer could have ascertained by the exercise of reasonable care."

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